Supreme Court, U.S.
FILED

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No. 03-

In The

Supreme Court of the United States

October Term 2003

Gregorio Igartúa

Petitioner

Oficina Etica Gubernamental de Puerto Rico

Respondent

Petition for a Writ of Certiorari to the
Supreme Court of Puerto Rico

PETITION FOR A WRIT OF CERTIORARI

Gregorio Igartúa
Box 3911
Aguadilla, Puerto Rico 00605
Petitioner Attorney pro se
787-891-9040

QUESTIONS PRESENTED FOR REVIEW

(1) IS THE IMPOSITION OF A PENALTY UNDER THE WAIVER REQUIREMENTS OF SECTION 3.3(E) OF THE PUERTO RICO GOVERNMENT ETHICS LAWS A VIOLATION OF THE PETITIONERS CONSTITUTIONAL RIGHT (FEDERAL AND STATE) TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

(2) CAN THE DIRECTOR OF THE "OEG" IMPOSE A PENALTY TO THE PETITIONER BASED ON DIFFERENT LEGAL DISPOSITIONS THAT WERE NOT PART OF THE ORIGINAL COMPLAINT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. (FEDERAL AND STATE)

(3) DID THE PUERTO RICO SUPREME COURT ERRED IN CONFIRMING THE APPEALS COURT JUDGMENT CONFIRMING THE "OEG" RESOLUTION AGAINST PETITIONER BY APPLYING ITS RULE 4(A) FOR SPLIT 3-3 OPINIONS AND THEREFORE VIOLATING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS (FEDERAL AND STATE) AND ARTICLE V - SECTION 3 OF THE PUERTO RICO CONSTITUTION REQUIRING THE SUPREME COURT TO BE THE COURT OF LAST INSTANCE IN PUERTO RICO.

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IN THE

U.S. Supreme Court

No. CC-2003-

PUERTO RICO GOVERNMENT ETHICS OFFICE
Complainant

Vs.

GREGORIO IGARTÚA DE LA ROSA
Petitioner

Petition of writ of Certiorari to the Supreme Court of Puerto Rico

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PETITION FOR WRIT OF CERTIORARI

Gregorio Igartúa de la Rosa (Petitioner)[1] petitions this Court for a writ of Certiorari to review the judgment of the Puerto Rico Supreme Court in this case.

OPINIONS BELOW

The Honorable Supreme Court of Puerto Rico emitted Judgment on September 4, 2002, notified on September 10, 2002. (See Appendix C) The petitioner requested reconsideration on September 23, 2002. The Court denied such reconsideration on February 25, 2003, notified on February 26, 2003. (See Appendix B) The resolution exposed that regarding the Motion of Reconsideration the Associated Judges, Hon.

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[1] All parties to this proceeding are set forth in the caption of this case

Naveira de Rodón, Hon. Rebollo López, and Hon. Rivera Pérez will reconsider. From this resolution petitioner solicited subsequent reconsideration in accordance with Rule 45-C of the Court. It was denied on August 21, 2003, and notified on August 22, 2003. (See Appendix A)

This Honorable Supreme Court extended time to file petition for a writ of Certiorari in the above-entitled case to and including 1/18/04. (Application No. 03A435)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to US Constitution Article III and US Supreme Court Rule 17.

STATUTES INVOLVED

The vagueness of the waiver requirement of Section 3.3(e) of the Puerto Rico Governmental Ethics Law is at issue within the context of the due process and equal protection of the laws constitutional dispositions. (Both Federal and State). Within these constitutional dispositions also is at issue the legal basis used to file a complaint and the one applied in the administrative resolution imposing a penalty. The applicability of Court Rule 4(e) of the PR Supreme Court for cases with split opinion is also at issue.

STATEMENT OF FACTS

This petition exposes various errors in the Puerto Rico Ethics Law, and of the Director of the "OEG" in applying it, taking advantage of the ambiguities and vagueness of the text in the law, which infringes constitutional rights like those exposed in this petition. A contradictory applicability situation is evidenced, discriminatory and arbitrary to which the petitioner and other American citizens residents of Puerto Rico and with public duties are exposed, with the result of the imposition of penalty that do not meet the constitutional criteria's, due process of law, and equal protection of the laws adopted by the Puerto Rico Supreme Court, nor by this

Honorable Supreme Court. The facts demonstrate that while serving publicly with honesty and moral integrity, the ethics law can be used arbitrarily and discriminatorily to penalize a public official. Even more, without materializing the conflict of interest that such "Law" seeks to avoid, and without behavior against its purposes. Consider that the Judges of the Puerto Rico Supreme Court were split in the opinion although all stated that petitioner did not violated any law. (See Appendix C and the Dissenting opinion).

Petitioner is a lawyer with offices in Aguadilla, Puerto Rico with contracts as an independent legal advisor by the Municipality of Aguadilla, since August 1992. Several of the cases assigned to him in 1992 were resolved after litigation for various fiscal years. The contracts were of public knowledge, were properly registered with the Municipal Secretary of Aguadilla, and in the Comptrollers Office of Puerto Rico, as required by law.

The petitioner was designated by then Governor of Puerto Rico, Honorable Pedro Roselló, as a member of the Board of Directors of the Government Development Bank (GDB), since June 8, 1994 until October 18, 1999. Initiating his functions as Director, the petitioner notified of the existence of a contractual relation of legal services with the Municipality by a letter via fax which solicited a waiver to the then Secretary of Treasury, Hon. Manuel Díaz Saldaña, and following his own instructions. He, also President of the Board of Directors of the Government Development Bank and of the Secretaries Council, advised him to send the letter. The President of the Bank was also notified of the contracts. They did not requested the petitioner of any additional requirements in compliance relating the contracts. Since July 1, 1994 to October 31, 1998, (date of filing of complaint), the petitioner, as Director, did not participated in any issue in the GDB related to the Municipality of Aguadilla. In fact, no case went to the Board related to the Municipality during all that period.

Article 3.3(e) of the Ethics Law provides as follows:

> **"(e) Neither a public official nor public employee can be part or have any interests in the incomes or benefits product of a contract with any other executive agency or governmental dependence, unless the Governor, previous recommendation of the Secretaries of Treasury and Justice, expressly authorizes it. It can only be carried out the contracting in the case provided in this paragraph without requesting and obtaining the Governor's authorization when the matter is:**
>
> 1. **Contracts of $3,000.00 or less and will only occur once a year in any fiscal year.**
> 2. **Leasing contracts, exchange, buy and sale, loans, mortgage insurance of any other nature that refers to a housing or lot of land provided for financing or the financing is insured or guaranteed by a governmental agency.**
> 3. **Service programs, loans, guarantees, and benefits, incentives hosted by governmental agencies. 3 L.P.R.A. 1823. (Supplied emphasis)**

As shown, Article 3.3(e) requires a grant of a waiver when public officials do business with the Government. Notwithstanding, no criteria is established in the law to define how the waiver is to be granted. Since petitioner had contracts for legal services with the Municipality of Aguadilla, the Director of "OEG" resolved that as Director of the GDB he was required to request a waiver to work in such capacity, but did not complied with such requirements and filed a complaint. Notwithstanding, a retroactive waiver was authorized to petitioner by the Puerto Rico Municipal Office Commissioner, as authorized by law if requested within ten days after the filing of a complaint. (See Appendix G) As will be argued below, the Ethics Law does not establish parameters within which a waiver can be granted or denied, and leaves absolute discretion in the hands of the public official that the First Executive designates the duty of concluding the concession of the waiver, without necessary guidelines to perform this discretion. Evaluated by this Honorable Court within its proper perspective the authority to grant or deny waivers is worse than the restrictive business practices that the Sherman Antitrust Law forbids. More than 200,000 public employees can be affected by its applicability.

On May 28, 1998, the "OEG" filed the complaint of this case. (See Appendix I) The "OEG" resolved to apply the Ethics Law to petitioner and later imposed him a fine of $3,000.00. (See Appendix F) The Director of the "OEG" recurred to dispositions foreign to the law in the Resolution, which were not part of the original complaint. That is, the Director based his opinion on legal dispositions, rules and administrative bulletins that were no part of the complaint, and/or adopted some years later. This action constitutes a clear violation to the rights of the petitioner to a due process of law and equal protection of the laws and an applicability of the laws "ex post facto".

The petitioner respectfully understands that this Honorable Court should welcome the petition herein requested because of the errors pointed out in the argument of issues below which will demonstrate that the resolution which is recurred is arbitrary, discriminatory and irrational. (Henríquez v. C.E.S., 120 DPR 194, 210 (1987). The intervention of this Supreme Court is justified because the determinations and the imposition of the fine evidences an action of the "OEG" Director which is unquestionably arbitrary, illegal and of such an irrational manner that his actions constitutes an abuse of discretion, and the determination can not be sustained through the evidence in the file. (Misión Industrial de P.R., Inc. vs. Junta de Planificación, 97 JTS 34, Pag, 728; Fuertes vs. ARPE, 93 JTS 165, Pag. 11383; Murphy Bernabé vs. Tribunal Superior, 103 DPR 692, 699, (1975). Moreover, the administrative action broke fundamental constitutional values. (La Facultad para las Ciencas Sociales vs. C.E.S., 93 JTS 88, Pag. 10783) (Constitution of the United States Amendment XIV – Constitution of Puerto Rico, Article II, Section 7). The penalty imposed in the "OEG" resolution affects petitioner, an American citizen, in the conduct of his profession in Puerto Rico, or in any state in the Nation where he would be in need to carry on his professional duties, including within the federal government.

In synthesis, the Government Ethics Law adopted by the legislator seeks a necessary purpose, but in the ambiguous form it is written, it leads to a contradictory arbitrary application, discriminatory and incorrect, as the one in this case. Unless the legislator amends the law, it's the obligation of the Courts to interpret it in a manner in which no injustices can be committed and the obligation of the petitioner to respond and be faithful to his innocent conscience exhausting all the resources humanly available to heal them.

ARGUMENT OF ISSUES

1) IS THE IMPOSITION OF A PENALTY UNDER THE WAIVER REQUIREMENTS OF SECTION 3.3(E) OF THE PUERTO RICO GOVERNMENT ETHICS LAWS A VIOLATION OF THE PETITIONERS CONSTITUTIONAL RIGHT (FEDERAL AND STATE) TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

The constitutionality of the petition procedure of request of waivers provided by the Ethics Law is the main axis in this petition. This Court should consider and determine that the requirement of waivers of the Ethics Law is arbitrary, suspicious and discriminatory. The Court should consider the following unanswered questions by the Ethics Office and by the Puerto Rico Court of Appeals and Supreme Court concerning the waiver requirements:

- What is a waiver?
- How many waivers can be granted to the same person?
- Under what criteria can a waiver be granted or not? Which are the exceptional situations to grant it?
- What is the procedure in case of a denial of a waiver?

- Is there a public file that informs which waivers have been authorized and which have not?
- What criteria establishes the law for those cases in which (for example), a lawyer, like the defendant, represents the Municipality of Aguadilla continually in judicial procedures that has extended over the fiscal year and each year it is required a new contract that take weeks to be signed and the waiver takes months to be granted? Should the petitioner give up on all the judicial cases of the Municipality the first of July of every year because grant of a waiver is pending and has not been granted?
- If a waiver requires previous contracting with a Municipality, why the State gets involved in a process to evaluate the concession of a waiver regarding a contract that has not been signed, that it is speculative?
- How much time can the Agency in charge take to emit the decision regarding the acceptance or denial of a petition of the waiver?
- Is there any alternatives provided for soliciting waivers for cases of continuing services for more than one fiscal year, or for cases in need of emergency services?
- The discretional procedure establishes in the Ethics Law to grant waivers, is against the principles established in the laws promoting free competition, by confining to the public official who makes the decision of granting or denying the waiver an unilateral discretion of the governmental commercial transactions process through an arbitrary or discriminatory applicability of such exercise or decisional faculty.

The questions pointed out evidence the arbitrary, capricious and discriminatory applicability that section 3.3(e) of the Ethics Law allows.

The petitioner respectfully requests this Honorable Court to evaluate the dissident opinion of the Hons. Judges Rivera and Rebollo in declaring unconstitutional the dispositions of the Ethics Law of the petition of waiver and that exposes in pertinent part (See Appendix C):

> (Vague Doctrine) "...The referred doctrine stands for, as a cardinal principle for the due process of law, that a statute is unconstitutional because it suffer of vagueness, when it fails to provide a reasonable warning to the citizens of the behavior that proscribes, or when it does not provide the sufficient guidelines to the officials that are in charge of putting them into force; permitting the arbitrary and discriminatory application. The foundations in which a statute of the vague doctrine is sustained are clearly formulated by the Supreme Court of the United States in Grayned v. City of Rockford, 408 U.S. 104 (1971)..." (p. 12)
>
> ...Allowing that the officials in charge of applying the penal law, or intervenes with the constitutional rights of the individuals, will do it in a capricious or arbitrary way, and using as an only criteria their will of preferences is constitutionally not permitted. In fact, it is precisely the possibility that the law may be applied in an arbitrary and discriminatory way, because it does not exist the guidelines that limit the discretion of the governmental officials, which violate the constitutional principle of the due process of the law. The importance is that the legislator must establish adequate guidelines to limit the discretion of the governmental officials in implementing the laws of penal or punitive nature is such, that the Supreme Court of the United States has resolved that the premise more important of the vague doctrine of a law rests on the absence of the guidelines before mentioned..." (p. 13)
>
> **...As you can see, from the text of the Article 3.3(e) of the Governmental Ethic Law, supra, does not give away guidelines nor clear and specific rules that tend to avoid the arbitrariness or the capricious application of the**

dispositions. It does not establish the criteria that will use the Governor, or the official designated by the First Executive, to grant the waivers. It is not established the criteria to deny them. Neither does arises from the statute the criteria or rule that guides the discretion of the official, nor a procedure that can be worthy as a guide for the different officials that needs to solicit the concession of a waiver. We have examined the rules of the Governmental Ethics and these does not contain any disposition that establish the referred guides or criteria necessary for the Commissioner of Municipal Affairs to grant or deny the said waivers..." (p. 18)

...We conclude that the Article 3.3(e) of the Governmental Ethic Law, supra, does not establish the parameters in which a waiver could be granted or denied, in accordance with the intention of the legislator in approving such statute. As mentioned before, the intention of the legislator in approving the Governmental Ethic Law, supra, was to fight governmental corruption and avoid conflict of interest from the public officials. However, nor the statute, nor the Rules of Governmental Ethics, supra, formulate criteria so fundamental for the application of the law as what behavior constitutes or not a potential conflict of interest from the public officials that intends to establish a contractual relation with an agency or public instrumentality. Neither establishes what constitutes, or not, impropriate behavior from the public officials. So much as the statute as the Rule before cited, leave in hands of the official designated by the First Executive the responsibility of concluding in the concession of the waiver, without the necessary guidelines to carry out such discretion. There is NO doubt, that the concession or the denial is at the mercy of the total arbitrary or capricious interest of the public official in charge..." (p. 19-20) (See also: Kolender v. Lawson, 461 U.S. 352 (1982); L.H. Tribe, American Constitutional Law, Second Edition, Mineola, New York: The Foundation Press, Inc., 1988; City of Chicago v. Morales, 527 U.S. 41 (1999)

Even more, the Puerto Rico Supreme Court has established "in opinion of all the Judges":

> "... A law is null by vagueness if the prohibitions are not clearly defined. The imprecise laws may deceive the innocent by not providing an adequate warning. If the arbitrary and discriminatory application is to be prevented, the law must provide clear rules for those who apply them..." (O.E.G. v. Cordero, Rivera, 2001 JTS 119) – "...The vague doctrine has been traditionally used to evaluate statutes of penal nature..." (Id.)

In the other hand, the truth is that the petitioner, although having been granted a retroactive waiver, the applicability of the law is maintained – section 3.3(e) – because based on this section is that the Puerto Rico Appeals and Supreme Courts maintain the opinion of the PR Governmental Ethics Office. Notwithstanding, that the waiver was not solicited on time does not eliminate the status of "vagueness" of the law, because the Director and the Court did applied it to sanction the petitioner.

This Honorable Court should consider the exposed arguments and determine that section 3.3(e) of the Ethics Law is unconstitutional by being vague, and should resolve to leave without effect the resolution herein appealed and consider that it is subject to the discriminatory applicability of all the public employees in Puerto Rico. (There are over 200,000 employees working for the Government of Puerto Rico)

2) CAN THE DIRECTOR OF THE "OEG" IMPOSE A PENALTY TO THE PETITIONER BASED ON DIFFERENT LEGAL DISPOSITIONS THAT WERE NOT PART OF THE ORIGINAL COMPLAINT IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. (FEDERAL AND STATE)

This Honorable Court should disallow and leave without effect the resolution that imposes a penalty based on dispositions of the law applied in the "OEG" resolution without being part of the original complaint against the petitioner, and should resolve that such practice does not satisfies the minimum elemental requirements of the constitutional protection of the due process of the law and equal protection of the laws. (Constitution of the U.S. – Amendment XIV and Constitution of P.R. – Article II, Section 7).

The following table compares the original dispositions of law used as a basis of the complaint with the ones used to emit the resolution of the Ethics Office Director.

Contracts of the Petitioner with the Municipality of Aguadilla object of this complaint	Dispositions of Law informed in the Complaint (See Complaint Appendix I)	**Dispositions of law applicable in the Resolution by the Director of the "OEG" imposing a fine (See Resolution, Appendix F)**
95-008, of 1994-95 96-014, of 1995-96 97-160, of 1996-97 98-009, of 1997-98	- Article 3.3(e) Ethics Law - Administrative Bulletin #OE-1991-86	- Article 3.3(e) Ethics Law - Law No. 150, December 22, 1994 - OP. Sec. Just. No. 9 of 1973 and OPC-87-8 of March 25, 1987, cited in the Circular Letter "OEG" No. 94-01, of April 29, 1994. - Memorandum Circular OCAM No. 92-22, July 9, 1992 of Waiver Concessions. - Adm. Bulletin OD-1991-86 - Circular Letter No. 95-02 of the "OEG" of December 28, 1994 and OPC 96-250 of May 9, 1996.

		- Article 3.6 of the cited Ethics Law, Circular Letter No. 95-03 of February 1, 1995 - Article 3.3(h) Ethics Law - OPC-96-123 of March 1, 1996, referring to Article 3.7(e) - OCAM 92-27 and OCAM 93-3

Notice that many of the legal sources used by "OEG" in the resolution imposing a penalty to petition not only were not informed in the original complaint, but also were adopted afterwards the years 94, 95 and 96. To allow the practice of resolving complaints based on rules or laws that were not originally part of an ethics complaint violate the constitutional rights of the petitioner that protects him from the imposition of penalty by laws or rules retroactively, and/or by executive orders and/or ex post facto laws. (U.S. Const. Art. I Sec. 9, Const. PR Art. II Sec. 12). (See: Magriz Rodríguez v. otro v. Empresas Nativas, Inc., Force Constructors, S.E., etc. CC-96-394 (05/12/97) The imposition of a penalty by the application of legal dispositions that were not part of the original complaint warrant sufficient legal reason to leave without effect the "OEG" resolution and the opinion of the Puerto Rico Supreme Court.

3) DID THE PUERTO RICO SUPREME COURT ERRED IN CONFIRMING THE APPEALS COURT JUDGMENT CONFIRMING THE "OEG" RESOLUTION AGAINST PETITIONER BY APPLYING ITS RULE 4(A) FOR SPLIT 3-3 OPINIONS AND THEREFORE VIOLATING HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS (FEDERAL AND STATE) AND ARTICLE V – SECTION 3 OF THE PUERTO RICO CONSTITUTION

REQUIRING THE SUPREME COURT TO BE THE COURT OF LAST INSTANCE IN PUERTO RICO.

> "The Courts are authorized to interpret the laws when, among others, these are not clear or conclusive relating a particular matter; when the objective, carried out, is to provide a gap; or when, with the purpose to mitigate the adverse effects of the application of a law to a particular situation, the justice in this manner requires it." Sucesion Gilberto Alvarez Crespo v. Hon. Pedro Pierluisi, CC-1998-804 (2000 T.S.P.R. 21).

The Supreme Court of Puerto Rico adopted many years ago Rule 4(a) that provides that in case of a tied vote by the Honorable Judges in a case, the judgment of the Appeals Court will prevail. (4 L.P.R.A. XXI) In this case there was a 3-3 tied vote because one Judge (Hon. Baltazar Corrada del Río) abstained. The Court applied the Rule to the petitioner and therefore, the judgment of the Court of Appeals confirming the "OEG" resolution prevailed. Petitioner questions the applicability of the Rule as unconstitutional. The abstention vote has a negative and adverse effect against petitioner because then comes the applicability of the Rule because of the 3-3 vote. Moreover, the rule that a lower Court decision will prevail in the Supreme Court in a split decision is unconstitutional because the Puerto Rico Constitution provides that it is the Supreme Court the Court of last instance.

> Article V – Section 1
>
> The Judicial Power of Puerto Rico will be put into effect by a Supreme Court, and for those other courts that the law establishes.
>
> Article V – Section 3
>
> The Supreme Court will be the court of last instance in Puerto Rico and will be composed of a Judge President and four Associated Judges. The law can only vary the number of Judges, by petition of the sole Supreme Court.

Therefore, the Supreme Court of Puerto Rico, in applying to this case such rule, is altering these constitutional dispositions, because it is applying the decision of an inferior court and allowing an opinion to prevail that is not of the court of last instance as it is required. The judgment is violating the constitutional rights of the petitioner to the due process of law and equal protection of the laws (US Constitution Amend. XIV and PR Const.: Art. II-7) by such rule. It constitutes a mechanism by which beforehand a petitioner has a vote against his petition. Three to three under the rule is equivalent to four to two against the petitioner. In case of a vote by the Judges, the vote of a Judge that abstains is constituted in a vote against the petitioner by the effect of a tied vote, which automatically sets in motion Rule 4(a). The votes of the Hon. Judges Naveira de Rodón, Rebollo and Rivera provoked a tied vote and has as effect to their vote like if it was a vote against petitioner because the opinion of the Court of Appeals prevails. In addition the adverse effect that the rule provokes for even-voting violates the presumption of innocence that should protect the petitioner in case of an even voting. On the contrary, the even voting is equivalent to a guiltiness effect policy contrary to the Constitution. It is requested from the Court to consider and leave without effect the judgment applying Rule 4(e). Moreover, consider how unjust is the Rule by confirming from Appendix C that all the six Judges of the Puerto Rico Supreme Court resolved that petitioner did not violated any law, nor committed any crime, not even was there any appearance of inappropriate behavior.

Petitioner would respectfully submit and request that based on the legal arguments set forth above, the judgment of the Puerto Rico Supreme Court, the judgment of the PR Circuit Court and the Resolution of the "OEG" should be reversed.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, January 10, 2004.

Mr. Gregorio Igartúa de la Rosa
Petitioner and Counsel pro se
Col. 6050
Box 3911, Aguadilla, PR 00605
Tel. 891-9040; Fax 882-3011

CERTIFICATION: Copy of this motion has been sent to the parties at their addresses: Mr. Hiram R. Morales Lugo, Executive Director, of the PR Governmental Ethics Office, P.O. Box 194629, San Juan, P.R. 00919-4629; Mrs. Gretchen Camacho Rosy, and Mrs. Anaida Garriga Laporte, P.O. Box 194629, San Juan, P.R. 00919-4629; the Secretary of Justice, Department of Justice, San Juan, PR 00936.

APPENDIX

Appendix A

In the

Supreme Court of Puerto Rico

No. CC-2000-144

GREGORIO IGARTÚA DE LA ROSA
Petitioner

Vs.

PR GOVERNMENT ETHICS OFFICE
Respondent

Certiorari

RESOLUTION

San Juan, Puerto Rico, August 21, 2003

The Court being divided, to the second motion of reconsideration, denied. Be attained to the resolved.

The Court agreed and the Secretary of the Supreme Court certified. The Associated Judges Mr. Rebollo López, Mrs. Naveira de Rodón and Mr. Rivera Pérez would reconsider. The Associated Judge Mr. Corrada del Río, abstained.

Patricia Otón Olivieri
Supreme Court Secretary

Notified in San Juan, Puerto Rico, August 22, 2003.

Appendix B

In the

Supreme Court of Puerto Rico

No. CC-2000-144

GREGORIO IGARTÚA DE LA ROSA
Petitioners

Vs.

PR GOVERNMENT ETHICS OFFICE
Respondent

Certiorari

RESOLUTION

San Juan, Puerto Rico, February 25, 2003

The motion of reconsideration, submitted by the petitioner party, denied.

The Court agreed and the Secretary of the Supreme Court certified. The Associated Judges Mr. Rebollo López, Mrs. Naveira de Rodón and Mr. Rivera Pérez will reconsider. The Associated Judge Mr. Corrada del Río, abstained.

Patricia Otón Olivieri
Supreme Court Secretary

Notified in San Juan, Puerto Rico, February 26, 2003

Appendix C

In the

Supreme Court of Puerto Rico

No. CC-2000-144

GREGORIO IGARTÚA DE LA ROSA
Petitioner

Vs.

PR GOVERNMENT ETHICS OFFICE
Respondent

Certiorari

JUDGMENT

San Juan, Puerto Rico, September 4, 2002.

Through the present resource of Certiorari, the petitioner comes before us with a resolution dictated by the Court of Appeals in a resource of judicial revision. The said resolution confirms another given from the PR GOVERNMENT ETHICS OFFICE, which attributed the petitioner with an administrative fine for violation of the Art. 3.3 (e) of the Governmental Ethics Law.[1] Lets see.

I

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[1] 3 L.P.R.A. sec. 1823 (e).

The lawyer Gregorio Igartúa de la Rosa is a lawyer with private practices of his profession, with offices in the Municipality of Aguadilla. In the year 1993 signed a contract for professional services to represent and legally advise the Municipality of Aguadilla, hereon the Municipality, in those issues that the Municipality thinks necessary. On June 8, 1994 the former Governor of Puerto Rico, Pedro Roselló González, designated Mr. Igartúa, to the Board of Directors of the Government Development Bank, hereon Bank, as a representative of the private sector;[2] position occupied until September 30, 1999.[3] During this period of time, it was not discussed in the said corps any financial proposal of the said Municipality.[4] For that reason, Mr. Igartúa de la Rosa did not participate in any other issue related to the Municipality.[1] Neither did he gain any salary for his functions as a member of the Board of Directors of the Bank, he was only paid $300.00 for food expenses during his assistance at each meeting of the said Board.[2]

During the period of time in which Mr. Igartúa de la Rosa was a member of the board of Directors of the Bank, signed with the Municipality the following contracts:[7]

1. 95-008, fiscal year 1994-95, valid from July 1, 1994 to June 30, 1995.
2. 96-014, fiscal year 1995-96, valid from July 1, 1995 to June 30, 1996.

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[2] Enclosure of the Certiorari resource, Pag. 198.

[3] Id., Pag.137

[4] Id., Pag. 72

[1] Id

[2] Id., Pag.43

[7] Id., Pag.144

3. 97-160, fiscal year 1996-97, valid from July 1, 1996 to June 30, 1997.
4. 98-9, fiscal year 1997-98, valid from July 1, 1997 to June 30, 1998.

The contracts previously identified were registered en the Municipals Secretary Office and the Comptrollers Office.[8] Each one of these contracts surpasses the amount of $3,000.00. They responded the same terms and conditions since the original (95-008) and all the other contracts after the first were renewals. Beginning his functions as a member of the Board of Directors of the Bank, Mr. Igartúa de la Rosa notified to the former Secretary of Treasury and President of the Board of Directors of the Bank, Honorable Manuel Díaz Saldaña, of the contractual relationship with the Municipality of Aguadilla and requested a waiver.[9] It does not appear in the complaint nor the file that Mr. Igartúa de la Rosa had benefited in an illegal manner, by the contracts signed, nor has he committed any crime.

On May 28, 1998, the PR Government Ethics Office, hereon OEG, filed a complaint against Mr. Igartúa de la Rosa for violation of Article 3.3(e) of the Governmental Ethics Law, supra, alleged that he did not obtain the corresponding waiver to sustain contractual relationship with the Municipality during his function as a member of the Board of Directors of the Bank.[10] On August 19, 1998, Mr. Igartúa de la Rosa answered the complaint presented against him and denied the violation of the statutory disposition.[11] On August 12, 1998, Mr. Igartúa de la Rosa presented a Motion of Turndown to the said administrative organism, utilizing as a fundament the fact that a retroactive waiver was given from the OCAM.[12] The OEG gave a written answer to the Motion of Turndown on September 18, 1998. Alleged that, according to the Governmental Ethics Law, supra, the fact that Mr. Igartúa de la Rosa was given the retroactive waiver did not release him from the responsibility of violating the disposition of the law.[13] Through a resolution of November 23, 1998, the Examination Official of the OEG dictated the denial of the said motion.[14]

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[8] Id.

[9] Id., Pag. 60

[10] Id., Pag. 36

[11] Id., Pag. 51

Mr. Igartúa de la Rosa presented a "Motion of Petition of Summary Resolution" on December 4, 1998, requesting that the complaint filed against him can be declared denied.[15] However, the OEG presented, on December 21, 1998, a "Motion of Petition of Summary Resolution", alleging that there was no controversy about the facts and that, as a matter of right, the attribution of a fine proceeded.[16] After various process incidents, including a celebration of a hearing to discuss the motions and a stipulation of facts of the parties, the OEG gave a resolution imposing to Mr. Igartúa de la Rosa a fine of $3,000.00 for the violation of the Article 3.3(e) of the Governmental Ethics Law, supra.[17]

Unsatisfied, Mr. Igartúa de la Rosa pleads on December 15, 1999 before the Court of Appeals, through a resource of judicial revision.[18] The intermediate appellative court of law gave a resolution denying the revision requested on November 30, 1999, copy of such decision was filed on December 15 of this same year.[19] This Court determined that Mr. Igartúa de la Rosa is a public official and to who applies the Governmental Ethics Law, supra, and that he, in fact, violated the Article 3.3(e).

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[12] Id., Pag. 53
[13] Id., Pag. 63
[14] Id., Pag. 71
[15] Id., Pag. 73
[16] Id., Pag. 79
[17] Id., Pag. 138
[18] Id., Pag. 1

On February 22, 2000, Mr. Igartúa de la Rosa pleaded before this Curia, through the resource of Certiorari, imputing the Court of Appeals the commission of the following errors:

> FIRST: THE DIRECTOR OF THE OEG ERROR IN APPLYING ARBITRARILY THE ETHICS LAW TO A DIRECTOR OF THE PRIVATE SECTOR OF THE BOARD OF THE GOVERNMENT DEVELOPMENT BANK IGNORING THAT TO HIM APPLIES THE SPECIAL LAW THAT CREATES THE BANK AND IN VIOLATION OF HIS RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE COURT OF APPEALS TO DENY THE RESOURCE OF PETITION OF THE REVISION PRESENTED BY THE CLAIMANT.
>
> SECOND: THE DIRECTOR OF THE OEG ERROR DETERMINING THAT A DIRECTOR OF THE PRIVATE SECTOR OF THE BOARD OF THE GOVERNMENT DEVELOPMENT BANK IS A PUBLIC OFFICIAL ACCORDING TO THE ETHICS LAW TO IMPOSE A FINE ON HIM, VIOLATING HIS RIGHTS TO A DUE

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[19] Id Pag 169

PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE COURT OF APPEALS TO DENY THE RESOURCE OF PETITION OF THE REVISION PRESENTED BY THE CLAIMANT.

THIRD: THE DIRECTOR OF THE OEG ERROR DETERMINING THAT THE CLAIMANT REQUIRED WAIVERS (AN ARBITRARY REQUIREMENT) FOR PROFESIONAL SERVICES CONTRACTS WITH THE MUNICIPALITY OF AGUADILLA TO IMPOSE A FINE ON HIM, AND SUBSEQUENTLY VIOLATING HIS RIGHTS TO A PROPER PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE COURT OF APPEALS TO DENY THE RESOURCE OF PETITION OF THE REVISION PRESENTED BY THE CLAIMANT.

FOURTH: THE DIRECTOR OF THE OEG ERROR IN FILING A COMPLAINT AND IMPOSE A FINE TO THE CLAIMANT IN VIOLATION OF HIS RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE COURT OF APPEALS TO DENY THE RESOURCE OF PETITION OF THE REVISION PRESENTED BY THE CLAIMANT.

FIFTH: THE DIRECTOR OF THE OEG ERROR DEMONSTRATING PREJUDICE AND PARTIALITY BY MAKING A PRESS RELEASE OF THE FINE IMPOSED TO THE PETITIONER WITHOUT RUNNING OUT THE ADMINISTRATIVE RESOURCE

RECONSIDERING STILL AVAILABLE AND VIOLATED HIS RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE COURT OF APPEALS TO DENY THE RESOURCE OF PETITION OF THE REVISION PRESENTED BY THE CLAIMANT.

SIXTH: THE DIRECTOR OF THE OEG ERRED IN NOT CONTINUING THROUGH A HEARING WITH THE PROCEDURES OF THE COMPLAINT AND DENY THE TURNDOWN SUMMARY AND SUBSEQUENTLY VIOLATED HIS RIGHTS TO A PROPER PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AND THE COURT OF APPEALS TO DENY THE RESOURCE OF PETITION OF THE REVISION PRESENTED BY THE CLAIMANT.

With the benefit of the appearance of both parties, we resolve.

II

By being equally divided the Court and having dealt with this case, JUDGMENT is dictated confirming the resolution given by the Court of Appeals.[20]

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[20] To revoke a sentence dictated by the Court of Appeals, it is required the concurrence of the majority of the Judges of this Court to intervene in the consideration of this resource. Rule 4(a) of the Supreme Court Bylaw, 4 L.P.R.A. Ap. XXI-A, R. 4(a) y Junta Insular de Elecciones v. Corte, 63 D.P.R. 819 (1944).

The Court agreed and the Secretary of the Supreme Court certified. The Associated Judge Mrs. Naveira de Rodón disagrees with the written opinion. The Hon. Judge Mr. Hernández Denton emitted an Accordance Opinion, to which the Hon. Judge Mr. Adréu García concurs. The Hon. Judge Mr. Rivera Pérez dissents with a written opinion, to which the Hon. Judge Mr. Rebollo López concurs. The Hon. Judge Mr. Corrada del Río, abstained.

Patricia Otón Olivieri
Supreme Court Secretary

Notified in San Juan, Puerto Rico, on September 10, 2002.

Conformity opinion

given by the Hon. Judge Hernández Denton to whom the Hon. Judge Andréu García concurs.

San Juan, Puerto Rico, September 4, 2002.

The verdict dictated by this Court confirms the judgment of the Court of Appeals in the present case, by virtue of the Rule 4(a) of the Supreme Court Bylaw, 4 L.P.R.A. Ap. XXI-A R.4, we are satisfied with it. However, we must express in the present case for the importance that deserves the transparency in the governmental actions.

In the present controversy it is our duty to examine the administrative fine that the PR GOVERNMENT ETHICS OFFICE imposed to Mr. Gregorio Igartúa de la Rosa for the infraction of the Article 3.3(e) that prohibits a public official be part or have any interest in the profits or benefits product of a contract with any other executive agency or governmental dependence. In understanding that the determination of the PR Government Ethics Office was reasonable and in the framework of the specialized knowledge that deserves our regard, it is proceeded the confirmation of the verdict appealed.

I

Mr. Igartúa de la Rosa was designated by the Governor of Puerto Rico as a member of the Board of Directors of the Governmental Development Bank in 1994. While he was a member of this Board, four (4) contracts were signed for professional services with the Municipality of Aguadilla with out the required waiver by the Article 3.3(e) of the Governmental Ethics Law.[1] In general terms this articles prohibits the contracting of a public official with any agency or governmental dependence, and considers the concession of a waiver in exceptional situations.

In virtue of the contracts signature, on May 28, 1998 the PR Government Ethics Office filed a complaint against Igartúa de la Rosa for the violation of the said article. Once the Ethic Office filed the complaint, Igartúa de la Rosa immediately requested a retroactive waiver to the Office of the Commissioner in Municipal Affairs for the authorization of the contracts. After obtaining the waiver on August 11, 1998, Igartúa de la Rosa requested to the PR Government Ethics Office to turn down the complaint, already obtaining the waiver that stipulates the said Article 3.3(e). The Executive Director of the PR Government Ethics Office imposed a fine of $3,000.00 and determined that, according to the Governmental Ethics Law, the said retroactive waiver obtained by Igartúa de la Rosa would be only attenuating but not exempt of the sanctioned behavior.

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[1] Stipulated by the parties, these are the following contracts: 1) 95-008 fiscal year 94-95, of July 1, 1994 to June 30, 1995; 2) 96-014, fiscal year 95-96, of July 1, 1995 to June 30, 1996; 3) 97-160, fiscal year 96-97, of July 1, 1996 to June 30, 1997; 4) 98-009, fiscal year 97-98, of July 1, 1997 to June 30, 1998. All of these contracts exceed the amount of $3,000.00 for fiscal year.

Igartúa de la Rosa pleaded to the Court of Appeals requesting the denial of the resolution given from the PR GOVERNMENT ETHICS OFFICE. However, the appellative court determined that Igartúa de la Rosa "lack of argument of the way it should be to exempt of responsibility according to the Governmental Ethics Law", so the resource was denied. Unsatisfied pleaded before us, alleging that the fine imposed did not proceed, for the reason that the composition of the Article 3.3(e) is ambiguous, suffers from vagueness and the application may be contradictory, arbitrary or prejudiced, so it had to be invalidated.

After given the announcement requested and with the benefit of the appearance of the parties, we are in position to determine.

II

The ethics responsibility and moral integrity are ruling principles that the puertorrican society demands and claim from the public official and the governmental institutions. Reasonable explanation of the Governmental Ethics Law, Law Num. 12 of July 24, 1985, L.P.R.A. Sec. 1801 et. Sec. The state of right that establishes this statute, is directed toward watching that the governmental management incorporates and confirm the most high rules of healthy public administration and include an Ethics Code that regulate the public officials and employees behavior. Id. The cardinal principle of this legislation is to forbid actions that can put in danger the stability of the State's moral support. Id.

The Article 3.3(e) is a specific example of how to handle the principles of the Governmental Ethics Law before mentioned. This articles forbids that any public official or employee can be part of or have any interest in the income or benefits product of a contract with any other executive agency or governmental dependence. Lets examine the content of the said article:

> **"(e) Neither a public official nor public employee can be part or have any interests in the incomes or benefits product of a contract with any other executive agency or governmental dependence, unless the Governor, previous recommendation of the Secretaries of Treasury and Justice, expressly authorizes it. It can only be carried out the contracting in the case provided in this paragraph without requesting and obtaining the Governor's authorization when the matter is:**

1. **Contracts of $3,000.00 or less and will only occur once a year in any fiscal year.**
2. **Leasing contracts, exchange, buy and sale, loans, mortgage insurance of any other nature that refers to a housing or lot of land provided for financing or the financing is insured or guaranteed by a governmental agency.**
3. **Service programs, loans, guarantees, and benefits, incentives hosted by governmental**

agencies. 3 L.P.R.A. 1823. (Supplied emphasis)

Therefore, the Article 3.3(e) stipulates that the contract cannot be signed unless the Governor, with previous recommendation of the Secretary of Treasury and the Secretary of Justice, authorizes it. Regarding the Municipal contracts, the Governor in an Executive Order given in 1991 to the Commissioner of Municipal Affairs the faculty to grant waivers to regulate contracts among municipalities and public employees. For that reason a major administrative agility would be secure and these functions would be delegated to the public officials who regularly get involved in these situations and posses a major knowledge of the factors to be considered. Administrative Bulletin OE-1991-86.[2]

The said waiver is conceived as an exception of the sanctioned behavior, as it follows from the legislative chronicle of the said law.[3] It explains that Governor can grant waivers when he understands it is necessary for the benefit of the public interest. In other words, it only applies to special situations.

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[2] In the waiver given in this case by the Office of the Commissioner in Municipal Affairs, the Commissioner granted the waiver previously giving the following indications:
The Secretary of Justice in countless occasions has commented, and our Office has accepted, not to be in favor of retroactive waivers, unless it is demonstrated that special circumstances exist that deserves an exception to the rule. The present petition is considered, even though it is retroactive, taking in consideration that it is demonstrated that at the moment of the signature of the contracts some concerned agencies were notified relating them and they did not offer orientation regarding the procedures and the requirements of law to follow... (Quoting the opinion of the Secretary of Justice on June 26, 1986 and July 8, 1987).

[3] See, Senate Inform of P. from S. 50.

On the other hand, the Article 3.3(h) of the Governmental Ethics Law expressly clarifies, that when a public officials obtains a waiver after the Director of the PR GOVERNMENT ETHICS OFFICE pointed out the findings of violation, such a waiver is to be considered attenuating but not exempt of responsibility.
The Article 3.3(h) says the following:

> In each case where a contract has been signed in violation of the disposition of this section, and pointed out the violation by the Director of the PR GOVERNMENT ETHICS OFFICE that the steps to obtain the waiver in the ten (10) days after the finding has been pointed out has not been done, the contract will be revoked and the PR GOVERNMENT ETHICS OFFICE and Secretary of Justice will be authorized to solicit the Courts, representing the Commonwealth of Puerto Rico, that such a contract be declared null. When a contract is signed without obtaining the waiver to which items d and e refer to, or when the waiver is obtained after the signing of the contract, the Director of the PR Government Ethics Office may impose a fine to the public official for the omission of obtaining the waiver according to section 2201 of this Title the steps to obtaining the waiver in the ten (10) days following the findings of the Director of the violation of the items d and e will be considered attenuate but the public official will not be exempt of responsibility. (Emphasis supplied)

On the other hand, we have resolved and reiterated that the determination of specialized administrative organisms deserve great consideration and respect. San Antonio Maritime v. Puerto Rican Cement, res. the February 16, 2001, TSPR 16. Asociación vecinos del Hospital San Jorge v. United Medical res. January 19, 2000, 2000 TSPR 7, Municipio de San Juan v. Junta de Calidad Ambiental, res. December 14, 2000, 2000 TSPR 183, Rivera v. A&C Development, 144 DPR 450 (1997). The Law for Uniform Administrative Procedures in its section 4.5 establishes limitations on the scope of the judicial revision of administrative decisions and instructs that the Court will sustain the determinations of the agencies if they are based on substantial evidence found in the administrative file. 3 L.P.R.A. Sec. 2175. Therefore, we are obligated to sustain these determinations if they are supported by sufficient evidence that arises from the administrative file when considered in its totality. Misión Industrial, supra. We have defined substantial evidence as "that relevant evidence that a reasonable mind could accept as adequate for sustaining a conclusion" again Misión Industrial, supra; Hilton Hotel v. Junta de Salario Mínimo, 74 DPR 679, 687 (1953).

As a general rule the Courts recognize the interpretation done by the administrative agency of the laws that they have to put in to effect with a lot of weight and deference. T-JAC v. Caguas Centrum Limited, res. April 12, 1999, 99 TSPR 54. The judicial revision of the administrative determinations is limited to examining if the administrative actions was reasonable and in harmony with the legislative purpose or if on the contrary it was unreasonable, illegal, and was an abuse of discretion. T-JAC v. Caguas Centrum Limited, supra; Rivera Rentas v. A&C Development Corp., supra.

In cases were an agency imposes sanctions for the violation of the laws and regulations that this agency administers we recognize much discretion in selecting the sanctions that help to comply with the statutory objectives, this is in all cases that it has acted within the frame of it s specialized knowledge of the law, as well. Estado Libre Asociado de Puerto Rico vs. Frigorífico, res. August 28, 2001, 2001 TSPR 120. If the administrative decision is based on substantial evidence it is not ultravires and also has reasonable relation to the acts that want to be prohibit, the Courts will offer considerable deference to the sanction imposed by the agency. Rivera Rentas, supra.

In relation to the above normative we will consider the controversy before us.

III

A

To our understanding, the case in question has a simple solution. Igartúa de la Rosa signed four (4) contracts with the Municipality of Aguadilla while he was a part of the Board of Directors of Governmental Development Bank. This is precisely the conduct which Article 3.3 proscribe and in which Igartúa de la Rosa incurred, it is understood that this conduct is that in which a public official which is part of has some type of interest in profits or benefits product of a contract with any other executive agency or government department. Igartúa de la Rosa obtained the retroactive waiver after the complaint was filed against him. Acting correctly, the Director of the PR Government Ethics Office, once the administrative procedures was finalized, find the defendant in the amount of $3,000.00 and determined that the waiver that Igartúa de la Rosa obtained served as attenuate but does not make him exempt, just as the law says. This administrative action just as the imposed sanction was reasonable and in harmony with the legislative purpose of Article 3.3(e) for which it deserves respect and deference. The PR Government Ethics Office based itself at all times on substantial evidence that was kept on file and acted within the framework of their specialized knowledge. Their determination certainly kept reasonable relation to the actions that it wishes to prohibit, and therefore our revision must grant deference and consideration to the imposed sanction.

B

In spite of the above mentioned the petitioner proposes that we invalidate Article 3.3(e) because as he alleges there are no clear norms in the manner to obtain a waiver, therefore this statute is very vague and it lends itself to arbitrariness. Simply we cannot endorse such a proposal.

The petitioner is soliciting that we invalidate a statute of cardinal importance for the transparency of governmental action, when there does not even exist a situation of facts that deserves its consideration. The allegation of the petitioner would become relevant if in the factual situation of the present case there was some evidence of discrimination or arbitrariness against Igartúa de la Rosa at the time of granting this waiver. However, the factual situation of the case in question is substantially distant from these considerations.

The case here is that Igartúa de la Rosa in effect obtained the waiver after having been presented the complaint by the PR Government Ethics Office. Both parties stipulate this and there is no controversy on the subject. It is because of this that the arguments about arbitrariness and vagueness of the article referred to and much less its invalidity do not proceed once the waiver was obtained.

The Governmental Ethics Law and its Article 3.3(e) and 3.3(h) leaves itself open to the possibility that a waiver for the proscribed contract, that as the Senate report states, its used for exceptional situation that to the Governors judgment with the previous recommendation from the Secretary of Justice and the Secretary of Justice, benefit public interest. Notice that the waiver must be obtained prior to signing the contract, if it is obtained afterwards the Governmental Ethics Law is violated and the waiver would only operate as an attenuate factor.

This is precisely what happened in the present case. Igartúa de la Rosa incurred in the conduct that the Law of Ethics proscribes after the complaint was filed the waiver was obtained as a matter of exception. However, this waiver was retroactive for which is was considered attenuate and did not make the petitioner exempt of responsibility. In the case before us there was no indication that the waiver referred to was arbitrarily denied because in effect it was granted as a way of exception after the complaint have been filed.

In conformance to the above mentioned, the Court of Appeals acted correctly by granting deference to the PR Government Ethics Office and that way confirmed the fine imposed to the defendant. Certainly, Igartúa de la Rosa engaged in contract with the Municipality while he was a member of the Board of Directors of the Governmental Development Bank and even though a retroactive waiver was obtained this only acted as an attenuate. For the reasons mentioned before we are satisfied with the JUDGMENT that the Court emits today.

Federico Hernández Denton
Associated Judge

Dissident opinion by the Hon. Judge
NAVIERA DE RODON

San Juan, Puerto Rico, September 4, 2002

We express this dissident vote to certify the fundaments for which we understand in the circumstances of this case, does not proceed to attribute Mr. Gregorio Igartúa de la Rosa (hereon Mr. Igartúa or petitioner) a violation to the Art. 3.3(e) of the Governmental Ethics Law, Law Num. 12 of July 24, 1985, amended, 3 L.P.R.A. Sec. 1801 et seq (hereon Governmental Ethics Law).

Mr. Igartúa began to offer professional services as a lawyer to the Municipality of Aguadilla in 1993. Since July 8, 1994 to September 30, 1999, his role was as a member of the Board of Directors of the Government Development Bank (hereon BGF, Spanish acronym), representing the private sector. For his functions as a member of the mentioned Board, Mr. Igartúa only received $300.00 as a compensation for food expenses in his assistance in meetings.

While he was with the BGF, Mr. Igartúa continued to renew his professional services contract with the Municipality of Aguadilla. Therefore, after being assigned as a member of the Board of Directors of the BGF, the petitioner provided professional services that were deferred annually during this period. All of the contracts exceed the amount of three thousand dollars ($3,000).

Two weeks after having commenced functions in the BGF, Mr. Igartúa sent a letter dated August 30th 1994 to the then Secretary of Treasury and also President of the Board of Directors of the BGF, Manuel Díaz Saldaña, in which he solicited a waiver in relation to the professional services contract which he had with the Municipality of Aguadilla. In this missive, Mr. Igartúa also indicated that while he resolved the waiver issue "I will abstain in the Board from any issues concerning the Municipality of Aguadilla".[3]

Mr. Igartúa never obtained a response from the Secretary of Treasury in relation to the petition for the waiver. Due to these facts, on May 28, 1998 the PR GOVERNMENT ETHICS OFFICE filed a complaint against Mr. Igartúa for the violation of the Art. 3.3(e) of the Governmental Ethics Law, 3 L.P.R.A. Sec. 1823(e). The PR GOVERNMENT ETHICS OFFICE (hereon OEG, Spanish acronym) attributed the petitioner for not having obtained the corresponding waiver to sign a contract with the Municipality of Aguadilla while he was a functioning member of the BGF, according to what is required by the Art. 3.3(e) of the Governmental Ethics Law. Mr. Igartúa answered the complaint and indicated that the Office of the Commissioner for Municipal Affairs (hereon OCAM, Spanish acronym) had granted retroactive waiver for the years in which he had professional services contracts with the Municipality of Aguadilla.

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[3] In fact, the petitioner never participated during the period of July 1, 1994 until October 31, 1998 in any issue relating to the financing by BGF on behalf of the Municipality of Aguadilla. As stated in a certification emitted by the BGF on December 1, 1998.

After various procedures, the OEG attributed the petitioner a fine of $3,000 for the violation of the Art. 3.3(e) of the Governmental Ethics Law. Unsatisfied, Mr. Igartúa put forth a plea to the Court of Appeals, which denied the solicited resource. The Court pointed out that Mr. Igartúa was a public official hence Art. 3.3(e) applied, and that in fact he had violated the orders of this article.

Still unsatisfied, Mr. Igartúa pleaded before this Court a certiorari resource. Essentially, he alleges that his functions in the BGF did not categorize him as a public official, and therefore the Governmental Ethics Law does not apply, and the Art. 3.3(e) is unconstitutional.

Certainly, there is no doubt that Mr. Igartúa functions in the BGF and the nature of his position in this entity qualified him as a public official and as such, he is subject to the orders of the Governmental Ethics Law. However, for the reasons that we will describe, we consider that in this case the imposed fines to Mr. Igartúa do not proceed. Let's see.

II

The Art. 3.3(e) of the Governmental Ethics Law stipulates, the following:

> **"Neither a public official nor employee may have interest in the profit or benefits product of a contract with any other executive agency or governmental dependency only if the Governor, with previous recommendation of the Secretary**

of Treasury and the Secretary of Justice, expressly authorizes."

In simple terms, these dispositions require that a public official request and obtain a waiver from the Governor, according to the recommendations of the Treasury and Justices Secretaries, to sign a contract simultaneously with another agency or governmental dependency. As an exception manner, the said waiver is not necessary when the contract is for less than $3,000, of financing of secure homes by a governmental agency or incentive programs, or of loans and guarantees sponsored by different governmental agencies.

Thus the faculty, under this section, to grant waivers was given to the Governor, but has been delegated to diverse public officials or agency directors. In the cases where the contracting agency may be a Municipality, the faculty to grant waivers under the Art. 3.3(e) was given to OCAM with the Executive Order OE-1991-86 from December 17, 1991.

As we mentioned before, Mr. Igartúa, as a member of the Board of Directors of the BGF, was a public official. As a result, according with the Art. 3.3(e) of the Governmental Ethics Law and the OE-1991-86, a petition for a waiver must have been requested to sign contract for professional services with the Municipality of Aguadilla and at the same time continue functions with the BGF, which OCAM had the faculty to grant or deny.

There is no controversy in the fact that Mr. Igartúa did not obtain a waiver from OCAM to continue the professional relationship with the Municipality of Aguadilla after his nomination in the BGF, even after submitting the complaint by the OEG. In the other hand, the facts of this case demonstrate that Mr. Igartúa was no indifferent with regard to what the Governmental Ethics Law requires. In fact, **the petitioner did solicit a waiver to continue to sign contract with the Municipality of Aguadilla hardly two (2) weeks after beginning functions with the BGF.** What happened was that the petition was not submitted to OCAM, but through the Secretary of Treasury, public official that, according to the proper Art. 3.3(e) of the Governmental Ethics Law has the faculty and the duty to provide recommendations to the Governor relating the concessions of waivers.

On the other hand, the Art. 3.3(e) of the mentioned Governmental Ethics Law stipulates that a public official that has the desire to sign contracts with a government entity has to request a waiver before signing the contract. According to the evidence in the file, the professional relationship of the petitioner with the Municipality began with a contract that can be extended from year to year in **July 1, 1993**, which means, **before** being nominated for the Board of Directors of the BGF, which occurred on **June 8, 1994**. Since this date, the petitioner became a public official subject to the requirements of the Art. 3.3(e).

As you can appreciate, at the time when Mr. Igartúa was nominated to the BGF, the contract with the Municipality of Aguadilla was already valid. Even more, at that time the contract was extended for an additional year, according to the clause number four (4) of the said document.[4] In these circumstances it was simply impossible for the petitioner to request a waiver before signing a contract with the Municipality, due to the fact that the contract was already valid when beginning functions with the BGF. Due to this, it results illogical to penalize the petitioner for this reason.

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[4] Specifically, this clause stipulates that "the duration period of this contract is for twelve (12) months, starting on July 1, 1993 to June 30, 1994. Understanding that, **such contract**

Notice in addition that in the moment when Mr. Igartúa requests the waiver to the Secretary of Treasury, Manuel Díaz Saldaña, he was the President of the Board of Directors of the BGF. Logically, Mr. Igartúa solicits the waiver to this public official since the Secretary was not only the President of the Board of Directors from which the petitioner was part of it, but had the duty, according to the Art. 3.3(e), to recommend, if it was proper or not to grant the waiver.

The behavior of Mr. Igartúa has to be analyzed through the recent result of this Court in O.E.G. v. Cordero, Rivera, res. August 21, 1991, 154 D.P.R. ___ (2001), 2001 T.S.P.R. 118, 2001 JTS 119. We expressed there that "**the main purpose of the Governmental Ethics Law, amended, and the bylaws, is fight and prevent the corruption in the departments of the government, forbid that the public officials can make use of the advantages in the consecution of personal interests, and use their position of leadership and power to obtain dishonest economic benefits.**"

In addition, we specifically appointed our preoccupation that our eagerness to fight corruption may

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will be extended after this date, from year to year, unless any of the two parties notifies the other with sixty (60) prior the expiration date of any of the years in which the contract is valid, that desires the culmination of the contract."

distort the purposes of the Governmental Ethics Law, "converting it in an instrument to commit injustices, spoil the reputation of public officials who have served their country with dignity, honesty and dedication, and discourage the most prepared people select to dedicate themselves to the public service."

We will consider that the automatic application of the dispositions in the Governmental Ethics Law to this case, without taking into consideration the context in which the so-called non-ethical behavior of Mr. Igartúa, precisely stands by the injustices advised in the O.E.G. v. Cordero, Rivera, supra. Evaluated the steps taken by the petitioner regarding his petition of a waiver and the manner in which he proceeded during his functions in the BGF and as lawyer of the Municipality of Aguadilla, we do not find any noticeable governmental corruption. The behavior of the petitioner may be catalogued perhaps like carelessness, which is not even entirely attributed to him because, if it is true that he did not follow-up the petition of the waiver, it is also true that the Secretary of Treasury, public official with the faculty from the own law to participate in the process **did not do anything regarding the petition**, not even when he was named as the Comptroller of Puerto Rico in the year 1997. On the contrary, and with all the knowledge on the particular situation of Mr. Igartúa, the Secretary of Treasury and then Comptroller permitted him to continue with the steps without advising him or presenting him any observation on the possibility of the conflicts with the Governmental Ethics Law.

In these circumstances, it is reasonable to conclude that Mr. Igartúa acted during all these years under a genuine belief that he was proceeding legally in all his duties. Such belief must have been more strengthened for the petitioner by the fact that in his functions he never encountered conflicts between his professional services with the Municipality of Aguadilla and his functions as a member of the Board of Directors of the BGF.

It was not until the year 1998, when the OEG files a complaint that Mr. Igartúa comes forth with the knowledge of his situation. Immediately he took the necessary measures to obtain from the public officials the correct steps for obtaining the waiver. We do not believe that the speed taken by the petitioner to carry out with this procedure once the complaint was filed against him meant that he previously knew of such procedure and did not bother to do something about it. The actions of Mr. Igartúa demonstrate his innocence in making an effort to fulfill as soon as possible the procedure that, with all probability, he was unaware of and where he was informed in the complaint against him. It is important to point out the fact that, at August 30, 1994, when the petitioner requested the waiver to the Secretary of Treasury, the OE-1991-86 had been only approved for eight (8) months. It is probably that Mr. Igartúa did not know at the moment that the final decision over the grant of the waiver corresponded to OCAM.[5]

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[5] It results interesting to point out that OCAM, in granting the retroactive waiver to Mr. Igartúa, pointed out that "the present petition is considered, even though it is retroactive, taking in consideration that it has been demonstrated that at the moment in which the contracts where signed he notified the concerned agencies relating the contracts and was not orientated of the procedures and the requirements of the law that was to be followed; also, the quick attention carried out to obtain the waiver once he was aware of the complaint filed by the OEG… demonstrates that he did not have the intention to violate the law."

Taking in consideration the very particularly circumstances in this case, we understand that the automatic application of the Governmental Ethics Law is not justified. Precisely, this case in file evidences the injustices that can be committed when appealed the automatism application and interpretation of the law, even more in a statute of moral and ethical matter.

Applying the Governmental Ethics Law, we should avoid that it may become a weapon of attack against any public official that allegedly had failed with any of the dispositions, without analyzing before the specific circumstances in which the alleged violation is caused. This law should be an instrument to fight corruption, not to punish public officials not caring that they have proved that in their case there where no conflicts, sale of influences, nor illegal economic benefits. We should have present the principal that at the moment of interpretation of a specific disposition of law, it is our fundamental obligation to express effectively the legislative intention, settling the realization of the purpose the law seeks always having present the social purpose that inspired it. See: O.E.G. v. Cordero, Rivera, supra; Vázquez v. A.R.P.E., 128 D.P.R. 513 (1991); Zambrana v. E.L.A., 129 D.P.R. 740 (1992); Gobernador de P.R. v. Alcalde de Coamo, 131 D.P.R. 614 (1992).

III

Summarizing, considering the evidence in the file of this case, it is our criteria that it does not proceed to attribute sanctions to Mr. Igartúa for the violation of Art. 3.3 (e) of the Governmental Ethics Law. It is clear that the petitioner requested the waiver at the beginning of his duties with the BGF, and requested it to the Secretary of Treasury, public official that according to the said Art. 3.3 (e) are directly related with such procedures. The fact that Mr. Igartúa has not continued the steps does not denote lack of interest from him, but also, confidence in, if the proper Secretary of Treasury, who was also the President of the Board of Directors of the BGF did not manifest objection, there was not anything illegal in the fact of him continuing to offer his professional services to the Municipality of Aguadilla.

In addition, we must realize that from the files specifically we find that the signed contracts between Mr. Igartúa and the Municipality of Aguadilla where submitted to the Municipal Secretary and the Comptroller Office, according to the Bylaw Num. 33 of the Comptroller Office, Bylaw Num. 5743 of January 28, 1998. During the controversy period the Comptroller Office, that had the obligation to have judgment and inform about "the accounts, disbursement and agency incomes, instrumentalities and political subdivisions in which irregularities may be found",[6] and as a matter of fact had before him if the contracts signed by Mr. Igartúa, **never informed the petitioner of a problem or illegal matter regarding the contracts**. It is possible also to point out that since 1997, before this complaint was filed, the Comptroller was Manuel Díaz Saldaña, the same person to whom, being at that time the Secretary of Treasury and President of the BGF, Mr. Igartúa requested the waiver.

Finally, this file demonstrates that while he was the lawyer of the Municipality of Aguadilla and member of the Board of BGF, Mr. Igartúa did not participated in any transactions that could have constituted a conflict, and did not obtain illegal advantages for the Municipality taking advantage of his position in the BGF.

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[6] See the Art. 12 of the Law Num. 9 of July 24, 1952, the law that created the Comptrollers Office of Puerto Rico, 2 L.P.R.A. Sec. 82.

By all the legal reasons stated by law, we revoke the order of the Court of Appeals, also the fine imposed by the PR GOVERNMENT ETHICS OFFICE to Mr. Igartúa. We disagree, on the final judgment of this Court.

Miriam Naveira de Rodón
Associate Judge

Dissident Opinion emitted by the Associate Judge Mr. Rivera Pérez, to, which Associate Judge Rebollo López concurs.

San Juan, Puerto Rico on September 4, 2002.

Did the Appeals Court act correctly by confirming the resolution emitted by the PR Government Ethics Office, in which the petitioner was issued an administrative fine for violating Art. 3.3(e) of the Governmental Ethics Law?[7] Is a public official, in regards to this statute, a member of the Board of Directors of the Government Development Office, which represents the private sector and does not receive a salary for his functions? Is the Article referred to as Art. 3.3(e), supra and unconstitutional, because it is vague?

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[7] 3 L.P.R.A. sec.1823 (e).

Firstly, we will analyze if a member of the Board of Directors of the Government Development Bank, which represents the private sectors, is considered a public official in regards to the Governmental Ethics Law. To do this, our interpretation of the subject matter of Art. 1.2(a) of the Governmental Ethics Law[8]. This article indicates that a public official "includes those people that occupy positions or are employed in the Government of the Commonwealth of Puerto Rico that are endowed by sovereignty of the State, for which they intervene in the formulation and implementing of public policy". The controversy we find in front of us now revolves precisely around this definition.

The Article 14 of the Civil Code of Puerto Rico[9] states that "when the law is clear and void of all ambiguity, the word of it must not be underestimated under the pretext of carrying out it's spirit". We have sustained that before the clear words of the law we must not interpret the law to add elements contrary to the will of the legislator[10]. Nevertheless, the own Civil Code establishes the importance of considering the will of the legislator at the moment of interpreting the dispositions of the law. To this effects, the Article 19 of the Civil Code[11], sates the following:

> The most effective and universal means to discover the true meaning of a law when it's expressions are doubtful, is considering the reason and spirit of this law, to the causes and motives which induced the legislative powers to dictate it.

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[8] 3 L.P.R.A. sec. 1802 (a)
[9] 31 L.P.R.A. sec. 14
[10] Alejandro Rivera v. E.L.A., 140 D.P.R. 538 (1996); and Lasalle v. Junta Dir. A.C.A.A., 140 D.P.R 694 (1996)
[11] 31 L.P.R.A. sec.19

To this respect, we have expressed in repeated occasions that the function of the Court is to interpret the law and find the legislative intention to make it effective.[12] The reason for a legislator to approve a law if to right something that is wrong or to promote a public policy, so, when interpreting the law, the court must make sure that this purpose is executed.[13] The legislative intent can be detached from the exposed motives of the statute. Nevertheless, if it is not detached, it is necessary to inquire in other documents that surge form the legislative record to find it. Within these documents that will be studied are included, amongst others, the reports of the legislative commissions, prior projects of the law and the debates of the measures of the hemicycle.[14]

With Art. 1.2 (a) in mind, was Mr. Igartúa de la Rosa a public official, being that he was a member of the board of Directors of the Government Development Bank? Our answer to this question is yes.

From the test for the Motives Exposition of the Law Num. 12 of July 24, 1985, supra, known as the Governmental Ethics Law, comes the fact that the legislative purpose was to clean the image of the public

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[12] Chévere v. Levis, res. on March 15th 2000, 2000T.S.P.R. 42, 150 D.P.R. ____ (2000), 2000 J.T.S. 56; Irizarry v. J&J Cons. Prods., Co., Inc., res. On January 27 of 2000, 200 T.S.P.R. 15, 150 D.P.R. ____ (2000), 2000 J.T.S. 27; Monllor v. Soc. De Gananciales, 138 D.P.R. 600 (1995); Farmacias Moscoso, Inc. V. K-Mart Corp., 138 D.P.R. 497 (1995); González Pérez v. E.L.A, 138 D.P.R. 399 (1995).

[13] Chévere v. Levis, supra.

[14] Chévere v. Levis, supra; Irizarry v. J&J Cons. Prods., Co., supra.

Now, what are the participation of the members of the board of Directors of the Government Development Bank in the formulating and/or implementing of public policy? The letter of Constitution of the Government Development Bank instructs that "the Bank's business will be administrated and it's corporate power exercised by the Board of Directors composed of seven members".[20] From this statutory disposition it is obvious the implementing of public policy, in fiscal and economic terms, of the Government of Puerto Rico.

Mr. Igartúa de la Rosa was a member of the Board of Directors of the Government Development Bank. The fact that he did not receive a salary for his services, only a food allowance for his assistance to the Board meetings and that he only represented the private sectors in these, does not exempt him from the conditions of a public official, this is because the legislator wanted to include these persons under the scope of this law. As a member of the Board of Directors of the Government Development Bank, Mr. Igartúa de la Rosa participated of the formulating an implementing process of the public policy of the Bank. In fact, we conclude that Mr. Igartúa de la Rosa, a member of the Board of Directors of the Government Development Bank, was a public official subject to the conditions of the Governmental Ethics Law, supra

II

The Governmental Ethics Law has the purpose, among other things, to avoid the conflict of interests of the government officials. The article 1.2 (s) of this law, supra,[21] defines the conflict of interest of public officials in the following manner:

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[20] 7 L.P.R.A. sec. 552

> (s) Conflict of Interest. – Means that situation in which the personal or economic interest of the civil servant or of persons related to this civil servant, **are or could reasonably be,** in conflict with the public interest. (Emphasis ours).

The article 3.3(e) of the mentioned Law, supra, states that a public servant that wishes to have a contract with a governmental entity has to solicit a waiver before he is granted the stated contract. Mr. Igartúa de la Rosa is accused in the complaint of having solicited this waiver late. He was fined three thousand dollars ($3,000) for this. Nevertheless, we see form our file that, once named into the Board of Directors of the government Development Bank, Mr. Igartúa remitted a letter to the then Secretary of Treasury informing him of his contracts with the Municipality of Aguadilla and **soliciting of him the corresponding waiver.** From this conduct we can clearly see that Mr. Igartúa de la Rosa intended to comply with the law, from whose text specifically arises that the waiver will be conceded by the Governor with counsel from the Secretaries of Treasury and Justice.[22] From the evidence in files arises the fact that no issues concerning the Municipality of Aguadilla were discussed in the Board meetings during official, which had been stained by cases of governmental corruption. The statute we refer to also set out to avoid those people involved in the ministry of public administration to incur in these acts of corruption.

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[21] 3 L.P.R.A. sec. 1802 (s)

[22] It is inferred form article 3.3 (e) of the governmental Ethics Law, supra. Nevertheless, the then Governor of Puerto Rico, honorable Rafael Hernández Colón, delegated this function to the Office of the Commissioner of Municipal Affairs (OCAM Spanish acronym) through the Executive Order number OE-1991-86 of December 17 1991, when the contracts were between public officials and a municipality.

The Governmental Ethics Law, supra, was amended through Law Num.150 of December 22, 1994, to, among other things, add to the definition of public official those people who participate in the implementing and formulating of public policy. From the motives exposition of the statue mentioned before, comes that the legislator had the intention of avoiding any type of conflict of interest of public officials and even to avoid the appearance of such a conflict.

From the Report of the Governmental Ethics Commission of the Puerto Rico Senate on June 23, 1993, emitted in relation to P. of S. 50,[15] arises that in the legislative measure all members of the different Government Boards were included as public officials in what the Governmental Ethics Law is concerned, even if they do not receive compensation for their services. These persons should also be obligated to comply with the dispositions of the stated statute.[16]

The participation of the board of Directors of the Government Development Bank in the implementation of the State public policy, arises from the very statute that creates this institution. The Article 1 of the law

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[15] This Law project was later converted into the Law Num. 150 of the 22nd of December of 1994.

[16] The Legislative Assembly of Puerto Rico approved the law, by adopting the report of the Commission of Governmental Ethics without having any amendments.

Num.17 of the 23rd of September of 1948,[17] states the following:

> TO HELP THE STATE GOVERNMENT IN THE FULFILLMENT OF IT'S FISCAL DUTIES AND TO EFFECTIVELY PERFORM ITS GOVERNMENTAL RESPONSIBILITY TO SUPPORT THE PUERTO RICAN ECONOMY, ESPECIALLY THE INDUSTRIALIZATION, FOR THIS REASON, A CORPORATION IS CREATED AS A GOVERNMENTAL INSTRUMENT TO ACT, ON ITS OWN AUTHORITY, UNDER THE NAME OF "GOVERNMENT DEVELOPMENT BANK OF PUERTO RICO" (SUCCESSIVELY IN SECS. 561 TO 568 OF THIS TITLE DENOMINATED "THE BANK").

From the above statutory disposition, we can verify that the Government Development Bank is an operational branch of the Government of Puerto Rico in the implementing of its fiscal public policy and economy. This conclusion is reaffirmed in the content of Article 5 of Law Num. 17 of the 23rd of September of 1948, as amended,[18] which states that the purpose for the creation of the of the Bank was to help the Government of Puerto Rico to achieve its fiscal responsibilities and to develop the economy of the island. In the same manner, Article 3 of Law Num. 272 of the 15th of May of 1945[19] establishes the obligation of the Government Development Bank to serve as an financial consulting agent for the Governor of Puerto Rico and the Secretary of Treasury in matters relating to the emission of public debt and the financing of public works.

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[17] 7 L.P.R.A. sec. 551.

[18] 7 L.P.R.A. sec. 553

[19] 7 L.P.R.A. sec. 583

his incumbency there. It also does not arise that he obtained the contract with the Municipality while performing duties in the Board of Directors of the Government Bank since the evidence in the file establishes that this contract existed before he was appointed a member of the Board.

Also arising from the case in file, is that the observed conduct by Mr. Igartúa de la Rosa does not show signs of conflict of interest nor acts of corruption. On the contrary, his behavior exhibits the intention of complying with the law and to make public his contracts with the Municipality. From the facts determined by the office of Governmental Ethics, the conduct of the petitioner does not arise contrary to the intention of the legislative intention behind the statute in question.

III

We must pass judgment on the statement of the unconstitutionality by way of vagueness of Article 3.3(e) of the mentioned Law, supra, on matters instructed on the soliciting of waivers.

The petitioner in this case, Mr. Igartúa de la Rosa, alleges that the disposition contained in Article 3.3 (e) of the governmental Ethics Law, supra, violates his right to due process of the law, this because the mandate of the need of public officials to solicit a waiver to the Governor to be able to contract with other governmental entities, is vague and it lends itself to arbitrary application.

The Constitution of the United States and of Puerto Rico guarantees all citizens the due process of the law.

The referred guarantee is contained in Article II, Section 7,[23] of our Constitution, which instructs the following:

> Our fundamental rights are recognized as the right to life, liberty and **to the right to own property**. The Death Penalty shall not exist. **No person will be deprived of his or her liberty or property without due process of the law, nor will any person be denied the same protection of these laws in Puerto Rico**. Laws that undermine contractual obligations will not be approved. Laws will determine a minimum of property and belongings not subject to embargo. (Emphasis ours.)

The Fifth Amendment of the Constitution of the United States[24] instructs the following on this extreme:

> No person will be obligated to respond to a capital offense or slander, but in virtue of denouncement or accusation by a grand jury, except in those cases which occur in the naval or ground forces, or in the military, when these are in active service; nor can anyone be accused of the same offense twice to a judgment that may cause him or her to loose his or her life or corporal integrity; nor will he or she be compelled to declare in any case, against him or herself, **nor will his or her life, liberty nor property be taken from him or her, without due process of the law;** nor can private property be taken for public use without just compensation (Emphasis ours.)

The constitutional guarantee on due process of law has two aspects, a substantive and a procedural.[25] The substantive aspect protects the rights and liberties that are conceded by the Constitution of Puerto Rico and of the United States to the citizens when the State's public policy formula by legislative way and by regulation of the agencies of the Executive Power.[26] On the other hand, in the procedural aspect, the due process of law demands that the State guarantees a just process to a citizen, when there is intention to take hi or her life, liberty or property.[27] To these effects, we express in Rivera Rodriguez &Co. v. Lee Stowell, etc., supra.[28] in the following manner.

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[23] Historical Documents, 1 L.P.R.A., Art. II, sec. 7, page 280

[24] Historical Documents, 1 L.P.R.A, Amendment, Art. V, pages 183-184

> The due process of the law manifests itself in two distinct dimensions: substantive and procedural. Under due substantive process, the courts examine the validity of a law, in regards to the pertinent constitutional precepts, with the purpose of protecting the fundamental rights of the people. Under this analysis, the State, when approving laws or acting upon something, cannot affect unreasonably, arbitrarily, or capriciously the interests of property or liberty. On the other hand, in the procedural due process, the obligation to guarantee that the interference with the interest of liberty and property of an individual are done through a procedure that is just and equal is imposed on the State. (Quotes omitted).

We have established a series of requisites needed to comply with due process in the procedural scope at the

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[25] Senate President, res. The 30th of June of 1999, 99 T.S.P.R. 104, 148 D.P.R. ____ (1999), 99 J.T.S. 110; Rivera Rodriguez & Co. v. Lee Stowell, etc., 133 D.P.R. 881 (1993).

[26] Fd.

[27] Fd.

[28] Pages 887-888

time in which an adjudicative procedure by the state is being done. These are the requirements: (1) adequate notification of process; (2) process before an impartial official (3) opportunity of being heard (4) right to cross-examine witnesses and examine evidence presented against him or her; (5) have legal assistance; and (6) that the decision is based on the record.[29]

In the case before our consideration, we will analyze the statutes in question using substantive due process as a guide that covers citizens before the statutory disposition. Let's see.

IV

In the Federal stratum the doctrine of vagueness of the statute has been discussed extensively. This doctrine emerges as a consequence from the constitutional principle that guarantees a due process of the law to all citizens.[30] The doctrine of vagueness of a law is used to evaluate, for example, laws that restrict the liberty of expression and penal statutes, among others.[31]

The stated doctrine postulates, as a cardinal principal of the due process of the law, that a statute is unconstitutional for reason of vagueness, when it fails to provide a reasonable warning to the citizens of the conducts that it proscribes or when it doesn't provide enough guides to the officials that are in charge of putting it to work; this way allowing it's arbitrary and discriminatory application.[32] The fundamentals on which the doctrine of vagueness of a statute is sustained are clearly formulated by the Supreme Court of the United States in Grayned v. City of Rockford, supra,[33] where the following was determined:

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[29] Rivera Rodriguez & Co. V. Lee Stowell, etc., supra.

[30] Kolender v. Lawson, 461 U.S. 352 (1982); Smith v. Goguen, 415 U.S> 566 (1973); and Grayned v. City of Rockford, 408 U.S. 104 (1971). See, also, W.B. Lochart, Et. Also., The American Constitution, Cases and Materials, Fifth Edition, St. Paul, Minn.: West Publishing Co., 1981; and L.H. Tribe, American Constitutional Law, Second Edition, Mineola, New York: The Foundation Press, Inc., 1988.

[31] City of Chicago v. Morales, 527 U.S. 41 (1999); and R.D. Rotunda and J.E. Nowak, Treatise on Constitutional Law, Substance and Procedure, Third Edition, St. Paul, M.N.: West Group (1999).

> It is a basic principal of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. **Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application**. (Emphasis ours; footnotes omitted).

Permitting public officials who are in charge of applying a penal law, or who intervenes with the constitutional rights of individuals, be it that they do it in an arbitrary or capricious way, and using as their only criteria their will or preferences is constitutionally impermissible.[34] In fact, it is precisely the possibility that the law may be applied in an arbitrary and discriminatory manner, because there are no guidelines that set the limitations for the discretion of the public officials, which violates the constitutional principal of due process of the law.[35] The importance of the legislator establishing adequate guidelines to limit the discretion of the pubic officials in charge of implementing the laws of the penal and punitive nature is such, that the Supreme Court of the united States has resolved that the most important premise of the vagueness doctrine of a law lies on the absence of the before mentioned guidelines.[36] We find the best example of the importance that covers the absence of adequate guidelines in a penal law in the expression of the United States Supreme Court's expressions in Kolender v. Lawson, supra,[37] where the court instructed the following:

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[32] City of Chicago v. Morales, supra; Kolender v. Lawson, supra; Smith v. Goguen, supra; Grayned v. City of Rockford, supra.

[33] Pages 108-109

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine" is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a

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[34] City of Chicago v. Morales, supra; Kolender v. Lawson, supra; Smith v. Goguen, supra; Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[35] Smith v. Goguen, supra.

[36] Kolender v. Lawson, supra; Smith v. Goguen, supra.

[37] Pages 357-358

criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections". (Quotes omitted).

Having established the basis of the vagueness doctrine of a statute, as interpreted in the fiscal scope; we must now analyze the treatment given to this doctrine in the local jurisdiction. Let's see.

V

In the federal arena, the doctrine of unconstitutionality by way of vagueness of a law has been discussed in repeated occasions by this Curia by analyzing the disposition that guarantees due process of the law in the Puerto Rican Constitution. We have resolved that a law is vague if its prohibitions are not clearly defined.[38] In O.E.G. v. Cordero, Rivera[39], we express that a law is null by reason of vagueness, when it's prohibitions are not clearly defined **or when they do not prevent the arbitrary application of these because they do not provide the official in charge of it's applications clear and precise norms that can guide his or her discretion.** The doctrine of vagueness of a law applies when penal statues are concerned even when these do not restrain the right of free speech, and is intimately related with due process of law guaranteed by our Constitution.[40] The doctrine of vagueness lies upon the that the statues should give a reasonable warning to citizens about what is prohibited and, also, they should provide those who apply them, clear norms that prevent the arbitrary or discriminatory application of the statute.[41] In Pacheco Fraticelli v. Cintrón Antonsanti, supra, that the State and it's political subdivisions have the inherent faculties to establish regulations **but it is their obligation to provide guidelines and adequate norms to avoid the arbitrary application of such regulations by those officials that are in charge for this purpose.** A law that does not provide an adequate warning to the citizen of common intelligence about the aspect it prohibits or if it leaves the door open to the arbitrary or capricious application of itself on behalf of the public officials, violates the basic principle of due process of law and is null by reason of vagueness.[42]

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[38] Pacheco Fraticelli v. Cintrón Antonsanti, 122 D.P.R. 229 (1988) .

[39] Res. On the 21st of August of 2001, 2001 T.S.P.R. 118, 154 D.P.R. ____ (2001), 2001 J.T.S. 119, page 6.

[40] U.N.T.S. v. Srio. De Salud, 133 D.P.R. 153 (1993).

> **A law is unconstitutional not for it's particular form that it was applied in a specific case but for the possibility that it can be applied in an arbitrary manner or inconsistent in other situations.**[43]

VI

It is our responsibility to evaluate the statutory disposition in question, in regards to the doctrine before mentioned, to determine of it is in effect null by reason of vagueness. We cannot loose form perspective that Article 3.3(e) of the Law Governmental Ethics, supra, establishes a series of penalties for violating its dispositions. Therefore, we find ourselves before a law

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[41] O.E.G. v. Cordero, Rivera, supra, (Op. Concurrent of the Associate Judge Mr. Corrada del Río).

[42] Velázquez Pagán v. A.M.A., 131 D.P.R. 568 (1992); Pacheco Fraticelli v. Cintrón Antonsanti, supra; Vives Vázquez v. Tribunal Superior, 101 D.P.R. 139 (1973).

[43] Id.

> **$2,000, or both depending on the discretion of the court.**
>
> **If there are any aggravating circumstances the fixed punishment may be increase until a maximum of two years and $3,000. If circumstances deserve, the punishment may be reduced until a minimum of nine months of $1,000 dollars.**
>
> (1) ...
> (2) ...
> (3) The persona convicted of the established crimes in this subchapter will not have the benefit of a suspended JUDGMENT. (Emphasis ours.)

From the statutory dispositions before mentioned arises the clear and unequivocal manner the penal and punitive character that Article 3.3 (e) of the Governmental Ethics Law, supra. This reality makes the strict application of the vagueness doctrine imperative while evaluating it.

In the case of public officials with a municipality, an Executive Order from the Governor Num. OE-1991-86 of December 1, 1991[47] gave the task of handing out these waivers to the Commissioner of Municipal Affairs.

We can se that Article 3.3 (e) of the Governmental Ethics Law, supra, there are no guidelines, nor clear or specific norms that may avoid arbitrary or capricious application of its dispositions. It does not establish the criteria that the Governor or the public official designed by the first executive to grant these

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[47] This delegation was made at the light of the instructed in Law Num. 104 of June 28, 1956, 3 L.P.R.A. sec. 1 (a)

waivers. The criteria to deny them are not established. This statute also does not establish the criteria or norm that guides the discretion of this official. Nor is there a procedure to guide the distinct officials that need to solicit the concession of this waiver. We have examined the regulations of the Governmental Ethics Law[48] and **it does not contain any disposition that establishes the stated guides or necessary criteria so that the Commissioner of Municipal Affairs concedes or denies the waivers.** In accordance to Article 2.4 (h) of the Governmental Ethics Law[49], the Director of this Office has the duty of promoting those rules that are necessary to comply with the purpose and dispositions of the statute. The lagoons that could exist in the before mentioned law **could** and **should** be supplied Governmental Ethics Regulations, supra.[50] There is also no Executive Order emitted by the Governor that has such a scope.

We conclude that Article 3.3 (e) of the Law of Governmental Ethics, supra, does not establish the parameters within which a waiver could be granted or denied in since with the intention of the legislative when this statute was approved. As mentioned before the legislature attention when approving the Governmental Ethics Law, supra, was to fight government corruption and avoid conflict of interest on the part of public officials. However, nor the statute nor the governmental ethics regulations, supra, formulate criteria of fundamental to the application of the law, as is what behavior constitutes or not a potential conflict of interest that must be analyzed in accordance to the doctrine and applicable interpretations of the penal laws. Let's see.

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[48] Regulation Num. 4827, November 20, 1992, November 23, 1992.

[49] 3 L.P.R.A. sec. 1814 (h).

[50] Chabrán v. Bull Insular Line, 69 D.P.R. 269 (1948); and Puerto Rico Ilustrado v. Buscaglia, Tes., 64 D.P.R. 914.

The Article 3.3(e) of the Governmental Ethics Law, supra, instructs the following:

> (e) No public official nor public employee may partake of or have any interest in the profits or benefits which are product of a contract with another executive agency or government department, **unless the Governor, with previous recommendation from the Secretaries of Treasury and Justice, expressly authorize it.** The contract signing can only happen in the case foreseen in this section without soliciting and obtaining authority from the governor when:
>
> (1) Contracts in the amount of $3,000 or less and they only occur once during any fiscal year.
>
> (2) Leasing contracts, exchange, sale, loans, mortgage insurance or of any other nature that refer to a home, and or land property that will be financed or hose financing is insured or guaranteed by a government agency.
>
> (3) Services Programs, loans, guarantees and incentives sponsored by government agencies.
>
> In the cases specified, in clauses (2) and (3) of this section, the contracting agency authorizes the transactions when the following requisites are complied with:
>
> (A) It is concerning contracts, loans, insurance, guarantees, and accessible transactions to any citizen who qualifies.

> (B) The norms of eligibility are of general application.
> (C) The public official is complying with all the norms of eligibility and that he is not granted directly or indirectly a preferential or different treatment than the public in general. (Emphasis ours).

In article 3.3(h),[44] the Governmental Ethics Law authorizes the Director of the PR Government Ethics Office (OEG) to impose administrative fines to those officials who violate the dispositions of the Article 3.3(e) of this law, supra. In accordance with the statutory disposition before mentioned, the fine may not be more than $5,000, as the section 7.1 of the law of Uniform Administrative Procedure instructs.[45]

The Governmental Ethics Law, supra, **imposes penal responsibility to those officials that violate any of the dispositions.** To these effects, the Article 3.8 of the Governmental Ethics[46] instructs the following:

> (a) Penal Nature Action. –
>
> (1) Any person that intentionally violates the prohibitions and dispositions established in the sections (c), (d), (e) and (g) of section 1822, **in the sections (b), (c), (d) y (e) of Section 1823**, in section 1824 and in section 1827, all of this title, **will incur in a serious crime and will be sanctioned for each violation with punishment of reclusion for a fixed term of one year or with a fine of**

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[44] 3 L.P.R.A. Sec. 1823 (h)
[45] 3 L.P.R.A. Sec. 2201
[46] 3 L.P.R.A. Sec. 1828 (a)

on the part of the public official that intends to establish a contractual relation with an agency or public instrument. It also does not establish what constitutes or not inappropriate conduct on the part of the public official. The statute as much as the regulations mentioned before leave absolute discretion in the hands of the official that the first executive designates the duty of concluding the concession of this waiver, without the necessary guidelines to perform this discretion. There is no doubt that the granting or denial is completely arbitrary or capricious in the hand of this government official. As a result of the lack of adequate norms in the law and regulations mentioned before, the application of the statute **could** result arbitrary and capricious. **The statutes permits its application in a distinct manner in every particular situation leaving this common citizen in complete uncertainty and at the mercy of the impulse or will of the official that has the responsibility of applying it.** The official in charge has the liberty, because the statutes permit it, of using exogenous criteria to the law for the arrangement of a waiver application. This whole situation constitutes in a violation of due process of law of the Constitution of Puerto Rico guarantees its citizen.

We conclude that Article 3.3(e) of the Governmental Ethics Law, supra, violates the due process of law guaranteed by the Constitution of the United States and of Puerto Rico and is invalid by reason of vagueness.

It seems commendable and is in the highest public interest, the legislative purpose behind the Governmental Ethics Law, supra, to fight corruption. However, the constitutional rights that the Constitution of Puerto Rico and of the United States guarantee the citizens have to safeguard themselves before the interest of the state to pursue its legislative purpose. The legislature formulated his or her anticorruption public policy through the statute that we are now concerned with and, also, impose on the PR Government Ethics Office the obligation to approve a regulation to implement it. In this regulatory group the detailed and specific criteria should be included so that they serve the purpose of guiding and avoiding the arbitrariness of the officials in charge of implementing this public policy. This criteria should also serve the pressing and fundamental purpose of instructing citizens on the prescribed conduct by constitutional imperative of the guarantee of a due process of law. It is true that fighting corruption constitutes a pressing public issue, it is not any less true that this cannot be reached at the cost of individual liberty and the rights that the Constitution of Puerto Rico and the United States guarantees its citizens.

VII

By the legal basis described before, we would revoke the resolution dictated by the Court of Appeals as much as the decision emitted by the PR Government Ethics Office, and we would declare Article 3.3(e) the Governmental Ethics Law, supra, invalid because it is vague and ambiguous and in consequence, violates the guarantee due process of law, a right protected by the Constitution of the United States and of Puerto Rico.

Efraín E. Rivera Pérez
Associated Judge

Appendix D

COMMONWEALTH OF PUERTO RICO
IN THE
Court of Appeals
Regional Circuit of Aguadilla/Mayagüez

KLRA 990689

PR GOVERNMENT ETHICS OFFICE
Plaintiff

Vs.

GREGORIO IGARTÚA DE LA ROSA
Defendant

Administrative Revision
Violation of the Article 3.3(e) of the Law Num. 12 of
July 24, 1985, as amended Case Num. 98-QI-3917

Panel integrated by Judge López Villanova and Judges Córdova Arone and

Escribano Medina, Presenting Judge

RESOLUTION

In San Juan, Puerto Rico, November 30, 1999.

Defendant Gregorio Igartúa de la Rosa recurs to us soliciting that the resolution of September 27, 1999 emitted by the PR Government Ethics Office (Hiram R. Morales Lugo) that imposed on him and administrative fine of $3,000.00 for having violated Art. 3.3(e) of the Governmental Ethics Law be left without effect. The term that is conceded by Rule 63 of the regulations of the Court of Appeals, 4 L.P.R.A. Ap. XXII, having elapsed, we proceed to resolve the resource.

I

In relation to that pertinent to the resource, arises that on may 28, 1998, the PR Government Ethics Offices presented a complaint against the defendant, Gregorio Igartúa de la Rosa, for he had violated Art. 3.3(e) of the Governmental Ethics Law, 3 L.P.R.A. Sec. 1802 and following.

The defendant presented an answer to the complaint and a motion to dismiss on October 24, 1998, through and order on November 13, 1998, the Examining Official, Wanda M. Rocha Santiago, denied the motion to dismiss presented by the defendant, and he did not ask for a revision of this determination even though he had been notified since November 23, 1999.

During the administrative process, the parties stipulates a series of facts, as arises from the minutes of May 13, 1999; also, they stipulated various documents, see Appendix CC of the defendant, pags. 85 to 100.

The facts stipulated are the following:

1. That the defendant is member of the Board of Directors of the Government Development Bank since June 8, 1994 until present.

2. The defendant subscribed the following contracts for legal services with the Municipality of Aguadilla:

    a. 95-008, fiscal year 1994-95, valid from July 1, 1994 to June 30, 1995.
    b. 96-014, fiscal year 1995-96, valid from July 1, 1995 to June 30, 1996.
    c. 97-160, fiscal year 1996-97, valid from July 1, 1996 to June 30, 1997.
    d. 98-9, fiscal year 1997-98, valid from July 1, 1997 to June 30, 1998.

3. During the date in which the before mentioned contracts were valid, in the Board of the Bank it did not arise any case or situation related to the Municipality of Aguadilla.
4. That the contracts before mentioned were public and were duly registered in the Municipality of Aguadilla and the Comptrollers Office of Puerto Rico.
5. On August 30, 1994, the defendant notified of the existence of a legal service contract with the Municipality of Aguadilla by letter sent via fax to the then Secretary of Treasury, Hon. Manuel Díaz Saldaña, who was also President of the Board of Directors of the Government Development Bank.
6. At the time the complaint was filed, the defendant immediately solicited a retroactive waiver from OCAM, which was approved on August 11, 1998.
7. Each contract alluded to in the stipulation number 2 exceeded the amount of $3,000.00 per fiscal year.

Later on the parties presented written their arguments and the Examining Official made some additional determination of facts in the inform of August 27, 1999, which are following transcribed:

> "The parties presented documents with the motions in which they solicited the summary resolution of the case of files. They are record in the administrative file of this case in the Secretary of the OEG. Considering this, we make the following determination of facts:
>
> 8. In the letter dated August 30, 1994 the defendant informed Hon. Manuel Díaz Saldaña that since 1992 he had a contract with the Municipality of Aguadilla and solicited if he could grant a waiver relating the contract.
> 9. Since January 1, 1994 to October 31, 1998, the defendant, as a member of the Board of Directors of the Government Development Bank did not participate in any matter related to the financing of the Municipality of Aguadilla. (Certification of December 1, 1998 of the Secretary of the Board of Directors of the Government Development Bank for Puerto Rico, Delfina Betancourt Capó)
> 10. Formalizing the described contracts in the item number 2, they were all signed without the corresponding waivers by OCAM.

The resolution emitted on September 27, 1999, integrally accepted the Inform of the Examining Official[1] that applied the clear dispositions of the Governmental Ethics Law, 3 L.P.R.A. Sec. 1802 and following leading to the imposition of a fine for $3,000 for the violation by the defendant of this law.

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[1] Enclosure HH of the defendant's Appendix, Pag. 111 to 130.

The defendant alleges that the Executive Director of the PR Government Ethics Office (OEG) made six errors.

II

The first three errors are based on the same argument and because of this we will discuss them together: Lets see.

> FIRST: THE DIRECTOR OF THE OEG ERROR IN APPLYING ARBITRARILY THE ETHICS LAW TO A DIRECTOR OF THE PRIVATE SECTOR OF THE BOARD OF THE GOVERNMENT DEVELOPMENT BANK TO IMPOSE HIM AN ADMINISTRATIVE FINE IGNORING THAT TO HIM APPLIES THE SPECIAL LAW THAT CREATES THE BANK AND IN VIOLATION OF HIS RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. (FEDERAL AND STATE)

> SECOND: THE DIRECTOR OF THE OEG ERROR DETERMINING THAT A DIRECTOR OF THE PRIVATE SECTOR OF THE BOARD OF THE GOVERNMENT DEVELOPMENT BANK IS A PUBLIC OFFICIAL ACCORDING TO THE ETHICS LAW TO IMPOSE A FINE ON HIM, VIOLATING HIS RIGHTS TO A DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. (CONSTITUTION OF PUERTO RICO, ARTICLE II, SECTION 7).

THIRD: THE DIRECTOR OF THE OEG ERROR DETERMINING THAT THE DEFENDANT AS A DIRECTOR OF THE GOVERNMENT DEVELOPMENT BANK IS SUBJECT TO THE LAW OF ETHICS BECAUSE HER IS A PUBLIC OFFICIAL, WHICH REQUIRES A WAIVER WHEN CONTRACTING LEGAL SERVICES WITH THE MUNICIPALITY OF AGUADILLA TO IMPOSE A FINE, AND CONSEQUENTLY VIOLATING HIS CONSTITUTIONAL RIGHT TO THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS. (FEDERAL AND STATE)

The defendant presents as a basic foundation of the first three errors that his position as a member of the Board of Directors of the Government Development Bank does not qualify him as a public official as defined in the Governmental Ethics Law.

Section 1802 of the Governmental Ethics Law in its Section (a) defines the meaning of "public official" and instructs the following:

"(a) ... Includes those people that occupy positions or are employed in the Government of the Commonwealth of Puerto Rico that are endowed by sovereignty of the State, for which they intervene in the formulation and implementing of public policy".

In the same Section 1802 of the Governmental Ethics Law in its Section (e) it defines "executive agencies" in the following manner:

"(e) ... Includes organisms and entities of the Executive Department of the Government of the

Commonwealth of Puerto Rico, including public corporations, the municipalities and the agencies under the control of this department."

Law Num. 17 of September 23, 1948 in its Article 1 in the part pertinent to this resource instructs:

"…. For this reason, a corporation is created as a governmental instrument to act, on its own authority, under the name of "Government Development Bank of Puerto Rico". 7 L.P.R.A. Sec. 551.

It is evident that the Government Development Bank is public corporation who's officials are under the jurisdictional scope of the Governmental Ethics Law, 3 L.P.R.A. Sec. 1821, this includes the defendant as a member of the Board of Directors of the Bank, and as so, subject to all the dispositions of the law, among these to solicit waiver for the contract of legal service for the Municipality of Aguadilla.

The argument of the defendant to the effects that the dispositions of the Government Development Bank apply, in relation to infractions to the law by a part of the Directors of the Bank, is not merited, because we are not before a case of destitution as Director for having violated the Governmental Ethics Law. 7 L.P.R.A. Sec. 560.

It should be pointed out that the defendant solicited to OCAM a retroactive waiver within the ten days subsequent to the ethics finding done by the PR Government Ethics Office according to the law. 3 L.P.R.A. Sec. 1823(h).

It is important to recall that in the case where public official grants the defendant, a contract in this case, without having obtained a waiver and the waiver is obtained after having granted the contract, the Director of the OEG may impose a fine to the officials responsible for such omission. 3 L.P.R.A. Sec. 1823(h).

The defendant's pretension that to the effects of the retroactive waiver turned its sanction into academia and that the complaint should be dismissed, ignores that the steps taken to obtain the waiver within the ten subsequent days of the finding of a violation to Section (e) of Section 1823 will be considered attenuate but will not exempt of responsibility the official subject of the finding, 3 L. P.R.A. Sec. 1823(h). Because of this, none of the first three errors was committed.

The aspect of the quantity of a fine is a matter of administrative discretion that merits all deference within the judicial revision before us, being absent of prejudice, the favoritism and manifested error in the appreciation of the stipulated proof. Citizens to preserve Overton Park vs. Volpe, 401 vs. 402 (1971); Universal Camera Corp. vs. National Labor Relations Board, 340 vs. 472. (1951).

The fourth Error that the defendant alleges in his writing, instructs the following:

> " The Director of Governmental Ethics erred by filing a complaint and imposing a fine to the defendant in violation to his rights to due process of law and the equal protection of the laws. (Federal and State)."

The discussion of this statement does not convince us, since we are not before a violation of the

Governmental Ethics Law by conflict of interests. The conduct found on the defendant is on bad terms with section 1823 (e), consisting of having obtained various contracts of professional services with the Municipality of Aguadilla, while the defendant occupied the public position as a member if the Board of Directors of the Government Development Bank without having previously obtained a waiver as the law requires. The retroactive waiver granted to the defendant by OCAM, did not resolve his ethics problem before section 1823 (h), which is free of all ambiguity. The fourth error was not committee, but the defendant was guaranteed the due process of law and the equal process of law.

The fifth error alleged by the defendant states:

> "The director of the OEG erred demonstrating prejudice and partiality by making a press release of the fine imposed to the petitioner without exhausting the administrative resource reconsidering still available and violated his rights to a due process of law and equal protection of the laws (Federal and State)."

This error was also not committed because section1814 (r) of the Governmental Ethics Law confers the director of the Office the following power:

> (r) – Provide information and promote the diffusion and compensation of the norms of Ethics in the agencies to orient the public and to educate and create awareness among public official and citizens about the functions of the office and about Governmental Ethics in general.

Also, section 1851 (a) permits the Executive Director of the OEG, the diffusion of information about the functions, operations, or activities of the Office.

Let it be known that the publication of the information is posterior to the decision; therefore, nothing was effected in the steps taken by the defendant.

The sixth error signaled by the defendant says:

> Sixth: The director of the OEG erred in not continuing with the procedures of the complaint and subsequently violated his rights to a proper process of law and equal protection of the laws (Federal and State).

The defendant forgets that in the hearing of May 13, 1999, motions of summary judgment were submitted and that by motion of September 28, 1999 he asked that the case be resolved "that started more than a year ago". Appendix GG of the defendant, page 106.

An analysis of the file demonstrates that the defendant was given all possible opportunities to take the steps necessary and pertinent to the case. Furthermore, the petitions of extension were accepted.

The precedence of the summary mechanism is unquestionable to resolve an administrative complaint that does not have controversy of facts of any type.

The defendant did not take steps to obtain the waiver that the law requires; also, the steps were taken by soliciting to the Secretary of Treasury and president of the Board of Directors of the Government Development

Bank a waiver, does not exempt him of his responsibility under the laws of Ethics.

The ignorance of the law by the defendant does not exempt him from complying with these, 31 L.P.R.A. Sec.2. Cabassa v. Bravo, 1914, 21 DPR 185.

The defendant does not possess the argument of facts or rights that exempt him from responsibility in conformance to the Governmental Ethics Law.

III

In virtue of the before mentioned, the resource is denied. The court has decided this and the general Secretary has certifies it.

Gladys E. Ortega Ramirez
General Sub- Secretary

Aida I. Oquendo Graulau
General Secretary

Appendix E

COMMONWEALTH OF PUERTO RICO
IN THE
Court of Appeals
Regional Circuit of Aguadilla/Mayagüez

KLRA 990689

PR GOVERNMENT ETHICS OFFICE
Plaintiff

Vs.

GREGORIO IGARTÚA DE LA ROSA
Defendant

Administrative Revision
Violation of the Article 3.3(e) of the Law Num. 12 of July 24, 1985,
as amended Case Num. 98-QI-3917

Panel integrated by its president Judge López Villanova and Judges Córdova Arone and Escribano Medina.

RESOLUTION

In San Juan, Puerto Rico, January 11, 2000.

The motion of reconsideration submitted by the defendant, Gregorio Igartúa de la Rosa, has been considered, it does not adduce foundation or merit that permits for us to alter our resolution of November 30, 1999; because of this we resolved that it does not proceed.

The court has decided this and the general Secretary has certified it.

AIDA I. OQUENDO GRAULAU
General Secretary

Appendix F

No. 98-81 (98-QI-3917)

PR GOVERNMENT ETHICS OFFICE
Complainant

Vs.

GREGORIO IGARTÚA DE LA ROSA
Defendant

Violation of the Article 3.3(e) of the Governmental Ethics Law

NOTIFICATION OF RESOLUTION

Mr. Gregorio Igartúa de la Rosa
Box 3911
Aguadilla, PR 00605

THE SECRETARY that subscribe notifies that the Executive Director of the PR Government Ethics Office has dictated a **RESOLUTION** in the case of epigraph dated September 27, 1999 that has been properly registered and archived in the files of this matter.

And, being that your are or represent the injured party by the **RESOLUTION**, of which you may solicit reconsideration before the PR Government Ethics Office for revision before the Court of Appeals, I direct this notification to, having archived in the files of this case copy dated September 30, 1999.

In San Juan, Puerto Rico, September 30, 1999.

Luz B. Benítez
Secretary

RESOLUTION

Having effected the rigorous procedures in the epigraph case on the August 27, 1999, the Examining Official submitted the corresponding report before our consideration. After examining and evaluating, we integrally adopted the report endorsed by the Examining Official and we make it a part of this resolution. In the same manner, we approve the recommendation of the Examining Official and in consequence unadministrative fine is imposed on the defendant in the amount of $3,000.00 for having signed contracts with the Municipality of Aguadilla in violation of Article 3.3(e) of the Governmental Ethics Law of the Commonwealth of Puerto Rico.

Certainly as a lawyer, that is also a public official the defendant was in the obligation of watching for the faithful complaints of the dispositions of the Governmental Ethics Law and with the canons of professional ethics that rule the conduct of the lawyers in Puerto Rico. *In re Corona Muñoz,* OP. of October 11, 1996; *García O'Neill vs. Cruz,* 126 DPR 518 (1990); In re Ríos, 112 DPR 353 (1982); Canon 6 of the Ethics Canon that rule the lawyers of Puerto Rico.

It because of this, that we are warning the defendant that in the future he should rule his conduct according to the disposition of the Governmental Ethics Law of the Commonwealth of Puerto Rico.

The defendant should sign the imposed fine in the Secretary of the PR Government Ethics Office (OEG) with a certified check or money order a made out to Secretary of Treasury, within 30 days from the date in which this resolution is notified.

In conformity with the Uniform Administrative Procedure Law, Law Num. 170 of August 12, 1988 as amended, the party adversely affected by this resolution may solicit reconsideration before the PR Government Ethics Office within 20 days from the date of the files of the notification of this resolution. As an alternative the affected party could go directly to the Court of Appeals in judicial revision, within the time frame 30 days of the files of the admitted resolution.

Once the Motion of Reconsideration is presented to the OEG if it is denied or if the person does not act within the 15 days of having presented this motion the term to solicit judicial revision will begin again from the time when the denial is notified or the 15 days expire whichever be the case.

If OEG should reach a determination over the presented motion the term to solicit the judicial revision will begin from the date in which a copy of the notification of the resolution definitively resolving the motion of reconsideration is archived in the files. This resolution should be emitted and archived in file within the 90 days subsequent to the submittal of the motion of reconsideration. If the OEG receives the motion of reconsideration but does not take action in relation to it within the 90 days after having being submitted, it will loose jurisdiction over this motion and the term to solicit the judicial revision will begin on the date of expiration of the mentioned 90 days unless the OEG, with just cause and within those 90 days extends the term to resolve in a period of time that will not exceed 30 additional days.

REGISTER AND NOTIFY.

Given in San Juan, Puerto Rico on September 27,1999.

Hiram R. Morales Lugo
Executive Director

EXAMINING OFFICIAL'S REPORT

JURISDICTION

The faculty of the Examining Official to emit the present report is found in the Governmental Ethics Law of the Commonwealth of Puerto Rico Law Num. 12 of July 24, 1985, as amended; in the Uniform Administrative Procedure Law, Law Num. 170 of August 12, 1988, as amended; in the Procedural Regulations for Adjudicative Hearings, Num. 4749 of the Governmental Ethics Law, approved on July 31, 1992 and the order emitted by the Executive Director of the PR Government Ethics Office (OEG) Office on June 2, 1998.

CASE BACKROUND

On May 28, 1998 the plaintiff OEG by way of their legal representation Mr. Luis F. Avilés Colón and Mr. Jorge F. Raíces Román, attorneys, presented a complaint against Mr. Gregorio Igartúa de la Rosa. In this complaint it was alleged that Mr. Igartúa de la Rosa incurred in a violation to Article 3.3(e) of the Governmental Ethics Law before mentioned.

In this complaint it was adduced that Mr. Igartúa de la Rosa is a member of the Board of Directors of the Government Development Bank from June 8, 1994 until the present. In this period of time he formalized four contracts of professional services with the Municipality of Aguadilla without obtaining waivers as is required by the Governmental Ethics Law.

The defendant solicited an additional term to answer to the allegation of the complaint and it was conceded. Afterwards the defendant solicited another two terms for the same purpose and that a document be sent to him. Both petitions were conceded. In this way the defendant presented the answer to the complaint and a motion to dismiss. The plaintiff party was opposed to this and, then, the defendant presented a replica of opposition on the plaintiff's behalf. The Examining Official that subscribes determined that the motion to dismiss did not proceed.

After this the defendant presented a motion in which he solicited a summary resolution of the case in file, the plaintiff solicited the same and the defendant replied through a motion to the petition presented by the plaintiff. On May 13, 1999 a conference was held where the motions presented were discussed and a serious of facts were stipulated. The parties agreed that the plaintiff would send some documents to the defendant and he would respond if he objected to any of them. On June 14, 1999 the plaintiff informed through a motion that they had sent these documents to the defendant, that the defendant had not been opposed and that they were presenting these as stipulated evidence of the parties. After the 10 working days available to oppose had elapsed[1], and both parties having accepted the stipulated evidence[2], the case in file was submitted.

Taking into consideration Article 18 of the Rules of Procedures for the Adjudicative Hearings, before cited, and solicited by the parties, we proceed to recommend to the Executive Director of the OEG to resolve this case in a summary manner.

Continuing we present the following:

DETERMINATIONS OF FACT

The parties presented the following stipulations of fact in the conference celebrated on May 13, 1999:

1. The defendant is a member of the Board of Directors of the Governmental Development Bank since June 8, 1994 until present.
2. The defendant subscribed the following legal contracts with the Municipality of Aguadilla:
    a. 95-008, fiscal year 1994-95, valid from July 1, 1994 to June 30, 1995.

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[1] As is instructed in Article 8(B) of the cited Regulations of Procedures for Adjudicative Hearings.

[2] Order notified on August 24, 1999.

    b. 96-014, fiscal year 1995-96, valid from July 1, 1995 to June 30, 1996.
    c. 97-160, fiscal year 1996-97, valid from July 1, 1996 to June 30, 1997.
    d. 98-9, fiscal year 1997-98, valid from July 1, 1997 to June 30, 1998.
3. During the time in which the mentioned contracts were valid in the Board of the Bank there was no case or matter related to the Municipality of Aguadilla.
4. The contracts referred to be public and are duly registered in the Municipality of Aguadilla and in the Office of the Comptroller of Puerto Rico.
5. August 30, 1994 the defendant notified of the existence of the legal services contract with the Municipality of Aguadilla by a letter sent via fax to the then Secretary of Treasury, Hon. Manuel Díaz Saldaña, who was also the President of the Board of Directors of the Government Development Bank.
6. When the complaint was filed the defendant immediately solicited a retroactive waiver from the Office of the Commissioner of Municipal Affairs, which was approved on August 11, 1998.
7. Each contract of those alluded in the stipulation number two exceeded the amount of $3,000.00 per fiscal year. The parties presented some documents together with the motions in which the solicited the summary resolutions of the case of file. These are in the administrative file of this case in the OEG Secretary's Office. Considering the before mentioned, we formulate the following determination of facts:
8. In the letter dated August 30, 1994 the defendant informed Hon. Manuel Díaz Saldaña that since

1992 he had a contract with the Municipality of Aguadilla and asked if a waiver could be dispensed relating the contracts.

9. Since January 1, 1994 to October 31, 1998, the defendant, as a member of the Board of Directors of the Government Development Bank he did not participate in any issue relating to financing for the Municipality of Aguadilla. (Certification of December 1, 1998 from the Secretary of the Board of Directors of the Government Development Bank of Puerto Rico, Delfina Betancourt Capó)
10. When the contracts were formalized in section number two all were granted without the corresponding waivers from OCAM.
11. Before the submittal of the complaint in case, in a letter dated August 11, 1998, Mr. José A. Otero García, Commissioner of Municipal Affairs, granted waivers to the defendant for the granted contracts between himself, as legal assessor of the Municipality of Aguadilla, for the fiscal years 94-95, 95-96 and 96-97. Moreover, he granted a waiver for 1998-99.
12. In the letter dated August 11, 1998 the commissioner states that he took in consideration to grant the waivers, that at the moment in which the contracts were granted the defendant notified some of the concerning agencies, the defendant was not oriented on the procedure and requisite of the law that he should have followed, and the diligence demonstrated by soliciting the waivers once the defendant was notified of the complaint presented by the OEG.

CONCLUSIONS OF LAW

I. Applicable right to case in file

1. General aspects on the Governmental Ethics Law and its Article 3.3(e).

The Governmental Ethics Law of the Commonwealth of Puerto Rico, before cited, was approved with a purpose of promoting and preserving the integrity of the officials and employees of the Executive Branch of the Government of Puerto Rico. This law has as a fundamental principal to restore and maintain the trust of the people in their government and civil servants.

The cited Governmental Ethics Law establishes restrictions on the actions of civil servants of the Executive Branch and of ex-civil servants of all three government branches. These dispositions wish to discourage that the official actions of public officials and employees be affected by personal interest in detriment of public service. Also, these dispositions tend to incline to guarantee that the government procedures is free of conflict of interest and outside influences to the common good, and that the decisions are taken having present what genuinely convenient to public interest and not what could be beneficial to other civil servants.

To these affects Art. 3.3 of the Governmental Ethics Law instructs as follows:

> **"(e) Neither a public official nor public employee can be part or have any interests in the income or benefits product of a contract with any other executive agency[3] or governmental dependence,**

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[3] The Article 2.1(e) of the Governmental Ethics Law defines the term executive agency, (includes the organisms and entities of the Executive Branch of the Government of the Commonwealth of Puerto Rico, includes the public

unless the Governor, previous recommendation of the Secretaries of Treasury and Justice, expressly authorizes it. It can only be carried out the contracting in the case provided in this paragraph without requesting and obtaining the Governor's authorization when the matter is:

1. Contracts of $3,000.00 or less and will only occur once a year in any fiscal year.
2. Leasing contracts, exchange, buy and sale, loans, mortgage insurance of any other nature that refers to a housing or lot of land provided for financing or the financing is insured or guaranteed by a governmental agency.
3. Service programs, loans, guarantees, and benefits, incentives hosted by governmental agencies.

In the cases specified in the items 2 and 3 the contractor agency will authorize the transactions all the time that comes together with the following requirements:

a. Contracts, loans, insurances, guarantees or accessible transactions to any citizen who qualify.
b. The eligibility standards are of general application.
c. The public official or public employee comply with all the standards of eligibility and not receive a direct or indirectly preferred treatment or different of the general public.

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corporations, the municipalities and the agencies that are under the control of this branch)

This article applies to those employees or public officials, which are defined under article 2.1 of the Governmental Ethics Law:

> **(a) "Public official: includes the people that occupy positions or employments in the Government of the Commonwealth of Puerto Rico that are invested by the sovereignty of the State, who intervene in the formulation and implementation of public policy"[4]**

> (b) "Public employee - includes those people that occupy positions in the Government of the Commonwealth of Puerto Rico that are not invested on behalf of the sovereignty of the State, and includes regular and irregular public employee, those that lend services by contract that are equivalent to a regular positions, those in transitory position and those that are in probation.

In relation to public officials, from the 1970 the Secretary of Justice of Puerto Rico has sustained that the members of the Board of Directors of a public corporation are government officials because when while fulfilling the commended program to that organism exercise part of the sovereignty of the state, so they intervene directly in the formulation or implementation of public policy[5]. In harmony with what was said before, the OEG has determined that every member of the Board of Directors or of the Public

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[4] Amended by Law 150, approved December 22, 1995.

[5] OP Sec. Jus. Num. 9 of 1973 and OPC-87-8 of March 25, 1987, cited in the Circular letter of the OEG Num. 94-01 of April 28, 1994.

Corporation Government are officials subject to the dispositions of the Governmental Ethics Law.[6]

Article 3.3(e) of the Governmental Ethics Law prohibits that a **employee or a public official,** regular or ad-honorem.[7] **Be a part of or has any interest in the profits or benefits product of a contract with any other executive agency or government department.** Specifically, this article "has the purpose of avoiding that a official or public employee enter a contractual relation with any other executive agency in circumstances in which conflict of interest may arise between those that find themselves in the utilization of influence unlawfully in the acquiring of the contract".[8] The Supreme Court has expressed that "what is unlawful influence is something that cannot be seen, heard, nor felt; moreover it is a intangible and subtle conduct". Casiano Jr. v. Borintex Manufacturing Corp., Opinion of the Supreme Court April 14, 1993, 95 JTS 55.

Law Num. 3, supra, also provided other significant amendments to Art. 3.3(e), by adding other exceptions where the agency or program that grants the contract may authorized lending this contract will concurring some of the requisites this instructed in said article, without the intervention of the Governor nor the Secretaries of Justice and Treasury. Besides these particular circumstances that this article recognizes, that if any of these are present a waiver is not necessary, the language of this article is final by requiring the authorization of the Governor with previous recommendation from the Secretaries of Justices and

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[6] Ibid

[7] OPC-96-250 of May 9, 1996

[8] Exposition of the motives of Law Num. 3 of April 5, 1991, which amends Art. 3.3(e) of Law Num. 12 of July 24, 1985.

Treasury so that a contractual relation may be established.

In relation to the Municipalities, on December 17, 1991, the ex-governor of Puerto Rico, Hon. Rafael Hernández Colón, emitted an executive order, which is collected in the Administrative Bulletin Num. OE-1991-86. In this bulletin he delegated in the Commissioner for Municipal Affairs the faculty of granting the waivers to formalize contracts between the Municipalities and any of their assemblymen, officials or employees, or officials and state employees and of other municipalities.

When this delegation was received, the Circular Memorandum OCAM Num. 92-22 of July 9, 1992 on concession of waivers was promulgated. In this memo the contents of the bulletin is informed. It is indicated that the waiver is an exceptional measure and that it requires that you exercise great rigor and its concession. The petition to OCAM must be made prior to the formalization of the contractual relation. This memo instructs that not complying with this condition makes the delegated action be converted into an academic exercise of ratification or validation of an action already consummated, which takes the virtue out of the essence and purposes of the very waiver and the law. This memo goes further when it indicates that OCAM will not consider these petitions that do not comply with the requisites of presenting the petition beforehand. This position was ratified in the Circular Memorandum OCAM 93-3 of February 8, 1993. However, this clear public policy, OCAM has conceded waivers of previously granted contracts.

The prohibition contained in Art. 3.3(e) falls on the public official. It is to this person who is responsible of soliciting the corresponding waiver to the official authorized to grant these.[9] Every renovation of contract previously granted requires the concession of a waiver. On the other hand, it is the responsibility of the official who concedes the waiver to send a copy of this waiver to the PR Government Ethics Office.[10]

2. Article 3.3(h) of the Governmental Ethics Law

In Law Num. 12 of July 24, 1985, the legislator incorporated what we could consider the origin of art. 3.3(h) of the Governmental Ethics Law, as amended. This is how we see in 1985, and under another section, named Art. 3.3(F), it is instructed that:

> In any case in which a contract has been concerted in violation of the instructed in Art. 3.3, the contract will be nullified and the PR Government Ethics Office and the Secretary of Justice is authorized to solicit of the Justices Court, in representation of the Commonwealth of Puerto Rico, that this contract may be declared null.

Because of this, on December 22, 1994 through the Law Num. 150, the legislator substantially amended and re-designated this cited Art. 3.3(F). In conformity to Art. 17 of Law Num. 150 the amendments contained there would be effective immediately after they were approved, these not being of retroactive application.[11]

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[9] Circular Letter Num. 95-02 of the OEG December 28, 1994 and OPC-96-250 of May 9, 1996.

[10] Art. 3.6 of the cited Governmental Ethics Law, Circular Letter Num. 95-02 of February 1, 1995.

[11] Let it be warned that it is a recognized principal of legal hermeneutics that laws have a prospective effect, except that

This way, the amended article re-designated as Art. 3.3(h), actually instructs that:

> In any case that a contract has been concerted, in violation o the instructed in this article, and as the violation is pointed out by the Director of the Governmental Ethics office, steps have not been taken to obtain the waiver within the next ten days of the finding, the contract will be annullable and authorizes the PR Government Ethics Office and the Secretary of Justice to solicit the Courts of Justice representing the Commonwealth, that this contract will be declared null. When a contract is dispensed without obtaining a waiver to which the section (d) and (e) refer to, or when the waiver has

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by way of exception the legislator wants to give it retroactive effect. Art. 3 of the Civil Code of Puerto Rico, 31 L.P.R.A. Sec. 3; Franceschini v. Ujaque, 126 DPR 540 (1990); R Elfren Bernier y J.A. Cuevas Segarra, Aprobación a Interpretación de las Leyes en Puerto Rico, Segunda Edición, San Juan, Publicadores JTS, 1987, Vol. I Cap. 63, Pag. 391. The intention of giving retroactive effect to a law by exception should expressly appear or clearly arise from the statute. Vazquez v. Morales, 114 DPR 822, 831 (1983); Bernier y Cuevas Segarra, OP. Cit. In the same manner the retroactive application of a law proceeds, even if the retroactive effect is not expressly instructed, when this interpretation is the most reasonable and in harmony with the legislative purpose or when it arises from the language in all clarity. Díaz v. Srio. De Hacienda, 114 DPR 865, (1983) and Bernier y Cuevas Segarra, OP. Cit.

In the present case the intention of the legislator of giving a retroactive effect of Law 150 does not arise from the text of the law, nor from its history, or from the legislative purpose. In consequence it is understood that the character is prospective.

been obtained after signing the contract, the Director of the PR Government Ethics Office can impose a fine on the official responsible of obtaining the waiver, in conformance to the instructed in section 7.1 of the law Num. 170 of August 12, 1988, as amended, known as "Law of Uniform Administrative Procedures of the Commonwealth of Puerto Rico". The steps taken to obtain a waiver within the next ten days following the finding of the Director of a violation of sections (d) and (e) will be considered as attenuates but will not exempt of responsibility, the officials who are the object of the finding.

It is noticeable that it was not until the amendment in 1994, that the legislator incorporated in the Governmental Ethics Law a procedure as the before mentioned. Therefore, it was in 1994, where for the first time the Legislator, determined that the steps to obtaining a waiver made by a official or employee after signing a contract, within the ten days following the finding of the Executive Director of the OEG, will be considered as attenuating of responsibility.

After this amendment, we observe how Article 3.3(h) is divided into three fundamental aspects:

1. The aspect in relation to the annulment of the contract through which the Secretary of Justice and the Director of the OEG are authorized initiate before the courts in representation of the State an action of annulment;
2. The aspect in relation to the annulment of the contract through which the Director of the OEG of violations to the article (d) and (e) of the Article 3.3 by signing a contract without

obtaining a waiver or by obtaining the waiver after signing the contract. In these cases, the very Article 3.3 (h) facilitates the Executive Director of the OEG to impose a fine to the official and the employee responsible for the infraction.[12]; and,

3. The aspect in relation to obtaining the waivers in the ten days following the Directors, finding and it's effect, as an attenuate and not exempt of responsibility.

On the first aspect or article 3.3 (h), we can point out, that the Secretary of Justice has established that "only in extraordinary cases that in any way the public interest in affected and that there are circumstances of great weight, we will not exercise this faculty", Op. Sec. Just. Num. 13 of February 24, 1961.[13] In the same manner, it has been pointed out that the Governor will confirm a contract previously signed, if the "circumstances demonstrates that it has been done in good faith and that the services have been lent in the same way". Op. Sec. Just. Num. 10 of June 10, 1968. We cannot loose from perspective that even if it is not about a null contract per se, the contract was granted against the established procedure and properly promulgated for a healthy public administration.[14]

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[12] The fine will be imposed in conformance to the Uniform Administrative Procedural law, mentioned before.

[13] Cited in sentencing of the Supreme Court, where article 2 is analyzed of the Law of Ethics, Law Num. 28 of June 8, 1948. That article was applicable to contracts made between government organisms and its officials, for which the Governor's authorization was required, previous recommendation of the Secretary of Justice. The contracts granted without this authorization would be annullable. Bessosa Quiñones v. Corp. Azucarera de PR, judgment of February 8, 1995, 95-JTS-13.

In relation to the first and second aspect, we may point out that from Article 3.3 (h) arises, that the legislator took into consideration the possibility that waivers could be granted to contracts previously dispensed. However, he left clearly established in the text of the law, that the step taken to solicit this waiver within the ten days following the finding, do not keep the person exempt but will be considered an attenuate. If we look for the definitions of these words, attenuate is "to decrease something"[15] versus exemption, which means, "to free, liberate from charges, obligations, cares, guilt, etc."[16], we see that one excludes the other.

Of all the above exposed it should be clear that the legislative mandate is that you must obtain a waiver prior to the signing of a contract. The mechanism exposed in the cited Article 3.3 (h) I san exceptional in which the organisms responsible of granting the waivers, under those circumstances, have the assignment of examining the applications of these with grater rigor. Even when the Governor, or the official in which he delegates this faculty, grants a posteriori a waiver at the moment in which the contract was signed, it is important that we consider the text of the Article 3.3 (h). To these effects, the rule of Hermeneutics instructs that "when the law is clear and free of all ambiguity the text must not be underestimated under the pretext of fulfilling it's spirit". Civil Code of Puerto Rico, 1930, Article 14. It's because of this that in relation to the practice of granting waivers, after signing contracts, the OEG has expressed that "this practice is militant against its purpose [of the waivers] and of a healthy public administration"[17]

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[14] Differing from the radical annulment that is the imperfection of a contract that impedes the effect of jurisdictional process, the annulment is that perfection derived, above all, of determined capacity vices or will that leaves space for an action of annulment or impugnation, which, if it is successfully exercised produces the destruction of the act with retroactive force. Castan Tobeñas, Derecho Civil Español Común y Floral, Vol. 3 8th Ed., 1954.

[15] Diccionario de la Lengua Española, Real Academia, 21st ed. Madrid, 1994, Page 156.

[16] Ibid. Page 658.

In summary, it is necessary to point out that the legislator had the clear purpose of prohibiting contracts between public official and other agencies. For this reason he subordinated the validity of these to the authorization of the Governor, previous recommendation from the Secretaries of Justices and Treasury. The very law establishes the filter through which these contracts granted under theses circumstance have to go through. If this is not followed, we are in violation of Article 3.3(e) of the Governmental Ethics Law. Once the violation is found, acting with diligent attenuates with responsibility but does not eliminate it. If the legislator had wanted to exempt the official of all responsibility before the law, he would have established this.

II. Application of valid right of the facts of this case

So that the prohibition contained in the Article 3.3(e) is activated, of the Governmental Ethics Law it is necessary that the constitutive elements of this article concur. Next we will discuss these in relation to the facts of this case.

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[17] OPC- 96-123 of March 1, 1996, referring to the Article 3.7 (e).

1. In relation to a public official;

The defendant has been a member of the Board of Directors of the Government Development Bank of Puerto Rico since 1994. This is a corporation created as a governmental instrumentality of the state government to act under the authority of the government, under the name Government Development Bank of Puerto Rico (Bank).[18] The Bank is created to take action among other things, as a fiscal agent, pay master, financial consultant or informant of the Commonwealth of Puerto Rico and of the agencies, instrumentalities, commissions, authorities, municipalities and political sub-divisions of Puerto Rico, the Governor, the Executive Counsel, and the Treasury of Puerto Rico. The Board of Director has been delegated by disposition of the law the corporate powers of the Bank and the administration of tits business, therefore, the defendant as a member of the Board directly intervenes in the formulation and implementation of public policy of the Government of Puerto Rico.[19] In conformance to the status of rights exposed, we conclude that the defendant is a public official subject to the dispositions of the Governmental Ethics Law. In the same manner, the defendant recognized this by soliciting the waiver to the Department of Treasury in 1994 and to the

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[18] Law Num. 17 of April 23, 1948, 7 L.P.R.A. Sec. 551

[19] Among other functions, the Board of Directors of the Bank has the responsibility, with the recommendation of the president of the bank, of approving a policy of administration of risk for a business sale of devise taking in consideration the best utilization and protection of the resources of the state. Another of its responsibilities consists in acting as the Board of Directors of each one of the subsidiary enterprises created by the Bank, with the exception known as the Fund for the Development of Tourism in Puerto Rico. Ibid., sec. 552.

Commissioner of Municipal Affairs in 1998. The Commissioner also recognized this when he granted the waivers in a letter dated August 11, 1998.

2. The official "have a part or have any interests in the profit or gain product of a contract with any other government agency, or department";

In this case, the defendant, in his personal capacity, subscribed four contracts for legal services with the Municipality of Aguadilla in fiscal years 94-95, 95-96, and 97-98. These contracts exceeded the amount of $3,000 per fiscal year. Therefore, we conclude that the defendant, being a public official of the Government Development Bank, was part in a contract with another government agency, in this case with the Municipality of Aguadilla, and as a product of those contracts the defendant gained profits and benefits.

3. If the before mentioned elements occur, it is necessary that the Governor, previous recommendation of the Secretaries of Justice and Treasury, authorize the contract. In the case of Municipalities, this faculty was delegated on the Commissioner of Municipal Affairs. It will not be necessary to obtain this authorization where the particular circumstances of the Article,[20] are concerned;

At the time in which the contracts were granted between the defendant and the Municipality of Aguadilla, the defendant had not obtained the authorization or waiver from the Commissioner of Municipal Affairs for the granting of these waivers. It was not until after the filed complaint, August 1, 1998, that these waivers were granted for the previously signed contracts.

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[20] In this case in file, none of the exceptions of Article 3.3 (e) in which it is not necessary to obtain authorization of for waiver from the Governor, arises.

Notice that since 1994 the defendant knew that the need to obtain a waiver to these effects. Proof of this is that that year the defendant remitted a letter to the Secretary of Treasury where he informed him about his particular situation in relation to the bank and his contract with the Municipality of Aguadilla and he pointed out if there was any possibility in which he could receive a waiver. This act was not in conformance to what is instructed in the Administrative Bulletin number OE-1991-86. it was not the Secretary of Treasury's responsibility to evaluate the defendant situation. From 1991 this faculty had been delegated to the Commissioner of Municipal Affairs. This is what had been said in the Circular Memorandum OCAM 92-27 and OCAM 93-3.

The defendant, as in his legal character as much as legal assessor for the Municipality with which he signed a contract, knew or should have known the requirements established in the law and its regulations. The ignorance of theses laws does not excuse the unfullfillment.[21] More so, when the resources from the OEG existed to obtain orientation for the lawyers as much as the layman in the application and interpretation of the Governmental Ethics Law.

We conclude that the defendant violated the Article 3.3(e) of the Governmental Ethics Law. In this case four contracts were signed between the defendant and the Municipality of Aguadilla without the proper waivers and the consideration of the official that has the responsibility of evaluating, in accordance to the law and public policy, the future contractual relation between municipalities and public officials of other government departments.

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[21] Civil Code of Puerto Rico, 1930, art. 2.

Having been proven, the violation of Article 3.3 of Governmental Ethics Law, it must be determined if in the case in file, if the waivers granted by the Commissioner of Municipal Affairs, relieved the defendant of responsibility.

In support of his argument that the concession of waiver to previously granted contracts, disputes as inadmissible, the defendant presented through a motion of replica a petition of summary resolution on behalf of the plaintiff, two opinions of the Secretary of Justice from the year 1987. in these it was favorably recommended to the Governor that he grant waivers to contracts previously signed. It arises from the first opinion[22] that the delay in soliciting the waiver was because some doubt existed over if that contracting in particular was subject to the Governmental Ethics Law and if the waiver should be granted by the governor or by the OEG. Concerning the second opinion[23], we see that the reasons for not having granted with anticipation were that the corrections Administration was waiting for an opinion concerning the applicability of Art. 3.3(a) of the Governmental Ethics Law and the need to continue offering medical services to the penal was emitted. We do not know if the Governor finally granted the corresponding waivers in these cases.

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[22] Letter dated August 26, 1987, Subscripted by the Secretary of Justice, Hon. Héctor Rivera Cruz, directed to Hon. Luis Izquierdo Mora, Secretary of Health Department. It concerned a lawyer member of the commission of Investigation processing an appeal of the Puerto Rico Police that had a contract of investigation and consulting in the field of sexually transmitted diseases and health services in the prisons in the Latin-American Center of Sexually Transmitted Diseases of the Health Department. The granting of this waiver was favorably recommended to the Governor.

We can distinguish the first opinion of the case in file in that it is clear from the administrative bulletin Num. OE-1991-86 that the Commissioner of Municipal Affairs to whom had been delegated the authority to grant waivers in the cases related to municipalities and that it was the defendant who was responsible of taking the steps to obtain the waiver before signing the contract. In regards to the second opinion in the case in file the urgency nor necessity of the services to be lent was not stated as a reason for not having proceeded to obtain the waiver with before hand. In summary, the reasons offered for favorably recommending to the Governor that he grant the waivers in the mentioned cases is not distinguishable in this case in file. Moreover, these opinions do not leave the letter or the spirit of the law instructed in Art. 3.3(h) without effect. We want to leave clear that in this report we will not comment the foundation for which the Commissioner of Municipal Affairs granted the waivers in the case in file.

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[23] Concerning some contracts of medical services granted by the Corrections Administration. These contracts were granted without the corresponding waivers. The medical services were performed. In this particular case, the Secretary pointed out that this is in relation to an agency that needs medical services at all times given the nature of the community it serves. The granting of the waiver was favorable recommended by the Governor.

Finally, in light of applicable right it is forceful to conclude that the concession of these waivers does not exempt the defendant of being found at fault of violating art. 3.3(e0 of the Governmental Ethics Law. Even when since December 22, 1994, the law recognizes the possibility of obtaining a waiver for contracts previously signed, this law expressly signals out that the acquiring of the waiver after signing a contract will not exempt of responsibility but will attenuate.

In the present case we should begin by making clear that from the documented proof presented arises that contract Num. 95-008 of fiscal year 94-95, with a validity from July 1, 1994 through June 30, 1995, was granted prior to approving law 150 of December 2, 1994. This is, before the legislator established the necessary steps to be taken for a waiver after having signed a contract and the finding of the Executive Director of the OEG as attenuates of responsibility. Being that the law is only prospective, the granted contract for fiscal year 94-95, are not applicable as attenuates of responsibility established since 1994 in Article (h) of the law. In respect to the other contract, the documented proof demonstrates that they were granted under the validity of Law Num. 150, for which in harmony with this legislation the waiver acquired after signing these contracts will be considered as attenuate and not as exempt from responsibility.

Once this has been cleared, we can conclude that in respect to the four contracts subscripted with the Municipality of Aguadilla the defendant obtained the four corresponding waivers after the signing of these. Once the OEG filed the complaint against Mr. Igartúa de la Rosa, he solicited and obtained the waivers for the contracts previously granted. These steps taken by the defendant, by dispositions of the law, is considered as attenuate in respect to the three contract granted after December 22, 1994. Nevertheless, in should be pointed out, that in the delicate function of recommending the Director of the OEG, the fine recommended on the defendant we cannot ignore that we are before a lawyer, knowledgeable of the law, that as a public official signed four contracts in violation to Art. 3.3(e). Also, the documented proof demonstrates that since 1994 the defendant knew that he must take steps to obtain a waiver for the contracts that he would sign with the Municipality of Aguadilla and his personal capacity.

After having carefully evaluated the proof presented, we do the following:

RECOMMENDATION

In harmony with the determination of facts and conclusions of rights before exposed, we recommend to the executive director of the PR Government Ethics Office to impose on the defendant an administrative fine of $3,000.00 for not having obtained the corresponding waivers previous to signing the four contracts subscripted with the Municipality of Aguadilla in violation to Art. 3.3(e) of the Governmental Ethics Law. This fine should be paid within a term of 30 days starting from the time of the notification of the resolution, through a certified check or money order made in favor of the Secretary of treasury.

Respectfully submitted,

In San Juan, Puerto Rico, August 27, 1999.

Wanda M. Rocha Santiago
Examining Official

Appendix G

"OFICINA DEL COMISIONADO DE ASUNTOS MUNICIPALES"
OCAM

August 11, 1998

Mr. Gregorio Igartúa de la Rosa
Attorney at Law
Box 3911
Aguadilla, Puerto Rico 00605

RE: WAIVER

Dear Mister Igartúa

Making reference to your petition of a waiver with the purpose to validate the contracts that had as a legal adviser of the Municipality of Aguadilla during the years 1994, 1995, 1996, 1997 and 1998; and the one proposed to establish for the fiscal year 1998-99.

Due to the fact that you are a public official[1] (member of the Board of the Government Development Bank) and the contractual relation is with a Municipality, the disposition of the law applicable at your petition is disposed in the interruption (e) of the Article 3.3[2] of the Law Num. 12 of July 24, 1985, amended, known as "Governmental Ethics Law…",[3] that controls the contracting in the following terms:

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[1] "Public official: includes the people that occupy positions or employments in the Government of the Commonwealth of Puerto Rico that are invested by the sovereignty of the State, who intervene in the formulation and implementation of public policy" 3 L.P.R.A. Sec. 1802(a); Op. Sec. Just. Num. 41 of 1988, Op. Sec. Just. Num. 6 of 1990.

> **"(e) Neither a public official nor public employee can be part or have any interests in the income or benefits product of a contract with any other executive agency or governmental dependence, unless the Governor, previous recommendation of the Secretaries of Treasury and Justice, expressly authorizes it. It can only be carried out the contracting in the case provided in this paragraph without requesting and obtaining the Governor's authorization when the matter is:**
>
> 4. **Contracts of $3,000.00 or less and will only occur once a year in any fiscal year.**
> 5. **Leasing contracts, exchange, buy and sale, loans, mortgage insurance of any other nature that refers to a housing or lot of land provided for financing or the financing is insured or guaranteed by a governmental agency.**
> 6. **Service programs, loans, guarantees, and benefits, incentives hosted by governmental agencies.**

In the cases specified in the items 2 and 3 the contractor agency will authorize the transactions all the time that comes together with the following requirements:

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[2] 3 L.P.R.A. Sec. 1823 (e)

[3] 3 L.P.R.A. Sec. 1801 et. Seq.

a. **Contracts, loans, insurances, guarantees or accessible transactions to any citizen who qualify.**
b. **The eligibility standards are of general application.**
c. **The public official or public employee comply with all the standards of eligibility and not receive a direct or indirectly preferred treatment or different of the general public.**[4]

The basic premise of the law article mentioned is to avoid that a public official or public employee comes up to a contractual relation with an agency in circumstances were conflicts might arise[5], in which illicit influences are used in obtaining a contract.[6] For the contracting can be carried out it should come together with the exceptions before mentioned or in the result have obtained the waiver prior to the contracting.[7]

In this case the petition was for a retroactive waiver for the fiscal years 1994-95, 1995-96, 1996-97 and prospective for the years 1998-99. The Secretary of

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[4] In the Law Num. 12, supra, the term "Executive Agencies" is defined in the following manner: includes organisms and entities of the Executive Department of the Government of the Commonwealth of Puerto Rico, including public corporations, the municipalities and the agencies under the control of this department. 3 L.P.R.A. Sec. 1802(e).

[5] Clash: means the situation in which the personal or economic interest of the public server or people related to him, is or reasonable may be in conflict with the economic interest." 3 L.P.R.A. Sec. 1802(r).

[6] Op. Sec. Just. Num. 12 of 1993

[7] Power given to OCAM by virtue of the Administrative Bulletin from the Hon. Pedro Roselló, Governor of Puerto Rico, number OE 1998-06 of May 1, 1998.

Justice in various occasions has opinioned and our Office has accepted it, to not be in agreement with retroactive waivers, unless it can be demonstrated that there were special circumstances considered necessary to make the exception to the rule. The present request is considered, although it is retroactive, taking in consideration that it was demonstrated that at the moment of the signature of the contracts, some concerned agencies were notified relating these contracts and was not oriented on the procedures and requirements of the law that should have been followed; furthermore, the quick diligence made to obtain the waiver once he became aware of the complaint presented by the PR GOVERNMENT ETHICS OFFICE, as said in the interruption (h), Article 3.3 of the Governmental Ethics Law[8], demonstrates that their was no intention to violate the law.

Considering the circumstances of the present petition, the law dispositions and opinions given by the concerned agencies, in compliance with the faculty given through Executive Order on March 1, 1998. Administrative Bulletin Num. OE-1998-99, we grant the retroactive waiver for the fiscal years 1994-95, 1995-96, 1996-97 and prospective for the years 1998-99. Now he must restrain himself in making any decision or action as a member of the Board of Directors of the Government Development Bank that is related to the affairs of the Municipality of Aguadilla.

We remind that the process of a waiver is an exceptional measure for the contracting and not the rule. If you have the intention in contracting with any municipality or governmental agency, the required waiver must be requested, previous to the contracting.

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[8] 3 L.P.R.A. Sec. 1823(h)

With nothing more to add.

Cordially,
José A. Otero García
Commissioner

Appendix H

In the
Commonwealth of Puerto Rico
PR Government Ethics Office
Hato Rey, Puerto Rico

No. 98-QI-8917

PR GOVERNMENT ETHICS OFFICE
Complaitant

Vs.

GREGORIO IGARTÚA DE LA ROSA
Defendant

RE: Violation of the Article 3.3(e) Law Num. 12 of July 24, 1985, amended

ANSWER TO THE COMPLAINT

Appears the defendant party in the epigraph case (by itself) and respectfully EXPLAINS, ALLEGES and SOLICITS:

1. Paragraphs number 1, 4, 5, 6, 7 and 8 are denied.
2. Paragraph number 2 is accepted, except that it is clarified that no compensation is received for the function, only an expense allowance had been received.

3. Paragraph number 3 is accepted, except that it is unknown at this moment the exact amount of the cost received for each year.

AFFIRMATIVE DEFENSES

1. The complaint as it is written does not merit the privilege of a solution conforming the right.
2. There was no action whatsoever in bad faith to cover any information from the concerning agencies, on the contrary they were all informed of the position of the defendant Director and the contracts of the Municipality of Aguadilla.
3. Prescription
4. The contracts of each year with the Municipality were registered in the Municipal Secretary Office and these municipal contracts were notified to the Secretary of Treasury requesting a waiver for the reason that he was the Director of the Government Development Bank.
5. At the moment of receiving the notification of the complaint the corrective action was taken and OCAM authorized a retroactive waiver for each mentioned year and one for the present year 1998-99.

By all the before mentioned, from this Honorable - Office we respectfully request declares a denial to the complaint and order the filing of this case.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, today August 19, 1998.

Mr. Gregorio Igartúa
Attorney at Law

Box 3911
Aguadilla, PR 00605
Tel, 891-9040; Col. 6050

Certify: Copy of this motion has been sent to the parties at their addresses: Mr. Jorge F. Raices Román and Mr. Luis F. Avilés Colón, Attorneys at Law, P.O. Box 194629, Hato Rey, PR 00919.

Appendix I

In the
Commonwealth of Puerto Rico
PR GOVERNMENT ETHICS OFFICE
Hato Rey, Puerto Rico

No. 98-QI-8917

PR GOVERNMENT ETHICS OFFICE
Complainant

Vs.

GREGORIO IGARTÚA DE LA ROSA
Defendant

RE: Violation of the Article 3.3(e) Law Num. 12 of July 24, 1985, amended

COMPLAINT

1. This complaint is presented under the Governmental Ethics Law, Law Num. 12 of July 24, 1985, amended, of the Law Num. 170, of August 12, 1988, amended, Uniform Administrative Procedures Law and the Rule for Procedures on Adjudicative Hearings of the PR GOVERNMENT ETHICS OFFICE, of July 31, 1992, State Department Number 4749.

2. The defendant is a member of the Board of Directors of the Government Development Bank since June 8, 1994 to present, therefore he is a public official of the Commonwealth of Puerto Rico, for the application of the Governmental Ethics Law.
3. The defendant signed four (4) contracts with the Municipality of Aguadilla, to offer professional services in legal matters and received payments for $116,469.36. The contracts were the following:

Contract Number	Fiscal Year	Payment Received
95-008	1994-95	50,487.50
96-014	1995-96	63,343.61
97-160	1996-97	28,551.00
98-009	1997-98	24,087.25
		$166,469.36

4. For each one of these contracts it was necessary to previously obtain a waiver.
5. The waivers for these contracts should have been requested to the Commissioner of Municipal Affairs in compliance with the Administrative Bulletin Num. OE-1991-86.
6. The defendant had the obligation to request the waiver for each one of these contracts.
7. The defendant did not request nor obtained the waiver for each one of these contracts.
8. The behavior of the defendant constitutes a violation of the Article 3.3(e) of the Governmental Ethics Law that declares the following:

> **"(e) Neither a public official nor public employee can be part or have any interests in the incomes or benefits product of a contract with any other executive agency or governmental dependence, unless the Governor, previous recommendation of the Secretaries of Treasury and Justice, expressly authorizes it. It can only be carried out the contracting in the case provided in this paragraph without requesting and obtaining the Governor's authorization when the matter is:**
>
> 1. **Contracts of $3,000.00 or less and will only occur once a year in any fiscal year.**
> 2. **Leasing contracts, exchange, buy and sale, loans, mortgage insurance of any other nature that refers to a housing or lot of land provided for financing or the financing is insured or guaranteed by a governmental agency.**
> 3. **Service programs, loans, guarantees, and benefits, incentives hosted by governmental agencies. 3 L.P.R.A. 1823. (Supplied emphasis)**

As shown, Article 3.3(e) requires a grant of a waiver when public officials do business with the Government. Notwithstanding, no criteria is established in the law to define how the waiver is to be granted. Since petitioner had contracts for legal services with the Municipality of Aguadilla, the Director of "OEG" resolved that as Director of the GDB he was required to request a waiver to work in such capacity, but did not complied with such requirements and filed a complaint. Notwithstanding, a retroactive waiver was authorized to petitioner by the Puerto Rico Municipal Office Commissioner, as authorized by law if requested within ten days after the filing of a complaint. (See Appendix G) As will be argued below, the Ethics Law does not establish parameters within which a waiver can be granted or denied, and leaves absolute discretion in the hands of the public official that the First Executive designates the duty of concluding the concession of the waiver, without necessary guidelines to perform this discretion. Evaluated by this Honorable Court within its proper

and not receive a direct or indirectly preferred treatment or different of the general public.

ADVICE

The defendant party will have the right to an informal hearing where cause should be demonstrate for which this Office may not impose a fine for up to $5,000 for each infringement demonstrated, required payment to the State as a civil fine in an amount equivalent up to three times the cost of the economic benefit received, recommend the nominator authority an administrative fine, such as destitution or dismissal.

The previous, after a celebration of an adjudicative hearing, where the defendant party will have the right:

1. To appear by itself or be represented by a lawyer.
2. An impartial adjudication
3. Present evidence and face witnesses and
4. That the decision will be based on the file

We warn that the defendant will have a term of **20 days** to answer the allegations of this complaint at the moment received.

RESPECTFULLY SUBMITTED.

Certify: That in this date the present Complaint has been notified to the defendant by Certified Mail at Box 3911, Aguadilla, Puerto Rico 00605

In San Juan, Puerto Rico, today August 19, 1998.

Jorge F. Raices Román
Col. Num. 13162
Luis F. Avilés Colón
Lawyer of the Plaintiff
PR GOVERNMENT ETHICS OFFICE
P. O. Box 194629
Hato Rey, Puerto Rico 00919
Phone Number 766-4400
Fax Number 766-4421